TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 94

AGAPITA GALLEGOS, PETITIONER,

vs.

STATE OF NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

PETITION FOR CERTIORARI FILED JANUARY 29, 1951

CERTIORARI GRANTED JUNE 4, 1951

SUPREME COURT OF THE UNITED STATES

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUG. 28, 1951.

—6809

[fols. 1-3] **IN THE SUPREME COURT OF NEBRASKA**

AGAPITA GALLEGOS, Plaintiff in Error,

vs.

THE STATE OF NEBRASKA, Defendant in Error

PETITION IN ERROR—Filed December 20, 1949

Comes now the plaintiff in error, Agapita Gallegos, and respectfully represents unto the court that on the 19th day of November, 1949, in the District Court of Scotts Bluff County, Nebraska in a proceeding therein pending wherein the State of Nebraska was plaintiff and said Agapita Gallegos was defendant, said Agapita Gallegos was found guilty of crime of manslaughter and afterwards, to-wit: on the 23rd day of November, 1949, the said defendant's motion for a new trial was overruled by the court and judgment entered therein, finding the defendant guilty of manslaughter and sentencing said defendant to a term of ten years in the State Penitentiary at Lancaster, Nebraska; thereafter, on the 28th day of November, 1949, upon motion of said defendant, sentence was suspended pending the application for and securing a writ of error in the Supreme Court of Nebraska.

Plaintiff in error alleges that there is error in the proceedings manifest on the face of the record of said action in the following particulars:

1. The court erred in admitting over the objection of the plaintiff in error, evidence of purported statements, confessions or admissions of plaintiff in error when there was no evidence in the record of any kind that any crime had ever been committed.

2. The court erred in admitting over the objection of the plaintiff in error, evidence of purported statements, confessions or admissions of plaintiff in error when there was no evidence in the record of any kind that the person named in the complaint and information was deceased.

3. The court erred in admitting over plaintiff's in error [fol. 4] objections, evidence of purported confessions and statements of plaintiff in error, the record showing that such confessions and statements were extracted from the plaintiff in error by means of physical torture and threats

of torture, mental duress, illegal transportation and illegal detention and were not voluntarily made, thereby depriving petitioner of his liberty without due process of law in violation of the Constitution of the United States of America and in violation of the Constitution of the State of Nebraska.

4. The court erred in admitting over plaintiff's in error objections, evidence of purported confessions and statements of plaintiff in error, the record showing that such confessions and statements were extracted from the plaintiff in error by means of physical torture and threats of torture, mental duress, illegal transportation and illegal detention and were not voluntarily made, so that plaintiff in error was, in a criminal case, compelled to give evidence against himself in violation of the Constitution of the United States of America and the Constitution of the State of Nebraska.

5. The court erred in admitting evidence over objection of plaintiff in error, of a purported plea of plaintiff in error to the information in this case, the record showing that plaintiff in error did not understand English, that the information was read in English, then translated into Spanish, the record failing to show that the translation was correct, and the record showing that the translation was, in fact, not accurate.

6. The court erred in admitting evidence over objection of plaintiff in error, of a purported plea of plaintiff in error to the information in this case, the record showing that plaintiff in error did not understand English, that the information was read in English, then translated into Spanish, that the plaintiff in error did not plead "guilty" or "not guilty" but replied that he did not understand.

7. The court erred in not finding that there was not sufficient evidence to submit to the jury the question of whether or not the person named in the information and complaint was deceased.

[fol. 5] 8. The court erred in not finding there was not sufficient evidence to submit to the jury the question as to whether or not the person named in the information had met a felonious death.

9. The court erred in refusing to require the county attorney, upon application of plaintiff in error, to furnish to counsel for plaintiff in error, prior to trial, documents or statements of the plaintiff in error, not signed by plaintiff

in error, taken by police officers which purport to be admissions against the interest of plaintiff in error or purport to be confessions of a crime, the record at that time showing that plaintiff in error, prior to October 15, 1949, had not been represented by counsel, was ignorant, uneducated and unacquainted with the English language, was a citizen of the Republic of Mexico; said application being made for the purpose of ascertaining, prior to the time of the trial, whether said documents, statements or purported confessions were made to persons acquainted with the language in which they were written and also in the native tongue of the plaintiff in error, and for the further purpose of ascertaining if the purported translation is accurate and correct and for the purpose of ascertaining whether plaintiff in error, at the time said statements were purported to be made, made said statements voluntarily and with full understanding of the questions which were asked; the record now demonstrating that at the time said application was made, there were written memoranda of admissions against the interest of and purported confessions of plaintiff in error, in existence which were produced in the trial of said cause and which were not furnished to the plaintiff in error as requested.

10. The court erred in refusing to require, upon the request of the plaintiff in error, the county attorney to furnish a statement or resume of all evidence which purport to be a statement or admission against interest or confession of a crime of the plaintiff in error, said request being made for the purpose of ascertaining, prior to the commencement of the trial, whether the person purporting to be a witness to the statement of the plaintiff in error, was competent to understand the native tongue of plaintiff in error and [fol. 6] whether such oral statements of plaintiff in error were properly translated, whether they were made voluntarily and whether plaintiff in error understood at the time said conversations occurred, the nature of the matters about which he was being questioned or about which he was stating; the record demonstrating at that time that the plaintiff in error was uneducated and unacquainted with the English language and a citizen of a foreign country.

11. Irregularity of prosecuting attorney in accusing the counsel for plaintiff in error, in open court in the presence of the jury, of misconduct.

12. The court erred in failing and refusing, upon request of plaintiff in error, to declare a mistrial for the misconduct of the county attorney described in Paragraph 11 above.

13. The court erred in failing and refusing, upon request of plaintiff in error, to advise the jury that the counsel for the plaintiff in error was not guilty of misconduct.

14. Irregularity of the prosecuting attorney in that the prosecuting attorney included in objections to the court, made in the presence of the jury, extraneous and irrelevant matters and did the same for the sole purpose of prejudicing the plaintiff in error before the jury.

15. The court erred in failing and refusing, on request of plaintiff in error, to declare a mistrial for the misconduct of the county attorney described in Paragraph 14 herein.

16. The court erred in holding that the information in this case stated facts sufficient to charge the plaintiff in error with a crime against the laws of the State of Nebraska.

17. The court erred in refusing to require a sufficient number of prospective jurors to be examined and qualified prior to the exercising of peremptory challenges so that there would be a sufficient number of jurors presented to the plaintiff in error before plaintiff in error was required to exercise any of his peremptory challenges; that the court required the plaintiff in error to exercise some of his peremptory challenges after only twelve men had been passed [fol. 7] upon for cause.

18. The court erred in admitting on behalf of the State, incompetent or irrelevant, immaterial and prejudicial evidence over the objection of the plaintiff in error.

19. Error of the court in excluding competent, relevant, material and proper evidence offered by the plaintiff in error.

20. That the verdict is not sustained by sufficient evidence.

21. That the verdict is contrary to the evidence.

22. That the verdict is contrary to law.

23. Error in the proceedings of the court in overruling plaintiff's in error motion to direct the jury to return a verdict of not guilty.

24. Error of law occurring at the trial and excepted to by plaintiff in error.

25. Error in refusing to give Instruction No. 1 requested by the plaintiff in error.

26. Error in refusing to give instruction No. 2 requested by the plaintiff in error.

27. Error in refusing to give Instruction No. 3 requested by the plaintiff in error.

28. Error in refusing to give Instruction No. 4 requested by the plaintiff in error.

29. Error in refusing to give Instruction No. 5 requested by the plaintiff in error.

30. Error in refusing to give Instruction No. 6 requested by the plaintiff in error.

31. Error in refusing to give Instruction No. 7 requested by the plaintiff in error.

32. Error in refusing to give Instruction No. 8 requested by the plaintiff in error.

33. Error in refusing to give Instruction No. 9 requested by the plaintiff in error.

34. Error in refusing to give Instruction No. 10 requested by the plaintiff in error.

35. Error in refusing to give Instruction No. 11 requested by the plaintiff in error.

36. Error in refusing to give Instruction No. 12 requested [fol. 8] by the plaintiff in error.

37. Error in refusing to give Instruction No. 13 requested by the plaintiff in error.

38. Error in refusing to give Instruction No. 14 requested by the plaintiff in error.

39. Error in refusi.. to give Instruction No. 15 requested by the plaintiff in error.

40. Error in refusing to give Instruction No. 16 requested by the plaintiff in error.

41. Error in refusing to give Instruction No. 17 requested by the plaintiff in error.

42. Error in refusing to give Instruction No. 18 requested by the plaintiff in error.

43. Error in refusing to give Instruction No. 19 requested by the plaintiff in error.

44. Error in refusing to give Instruction No. 20 requested by the plaintiff in error.

45. Error in refusing to give Instruction No. 21 requested by the plaintiff in error.

46. Error in refusing to give Instruction No. 22 requested by the plaintiff in error.

47. Error in refusing to give Instruction No. 23 requested by the plaintiff in error.

48. Error in refusing to give Instruction No. 24 requested by the plaintiff in error.

49. The court erred in giving Instruction No. 1.

50. The court erred in giving Instruction No. 2.

51. The court erred in giving Instruction No. 3.

52. The court erred in giving Instruction No. 4.

53. The court erred in giving Instruction No. 5.

54. The court erred in giving Instruction No. 6.

55. The court erred in giving Instruction No. 7.

[fol. 9] 56. The court erred in giving Instruction No. 8.

57. The court erred in giving instruction No. 9.

58. The court erred in giving Instruction No. 10.

59. The court erred in giving Instruction No. 11.

60. The court erred in giving Instruction No. 12.

61. The court erred in giving Instruction No. 13.

62. The court erred in giving Instruction No. 14.

63. The court erred in giving Instruction No. 15.

64. The court erred in giving Instruction No. 16.

65. The court erred in giving Instruction No. 17.

66. The court erred in giving Instruction No. 18.

67. The court erred in giving Instruction No. 19.

68. The court erred in giving Instruction No. 20.

69. The court erred in giving Instruction No. 21.

70. The court erred in giving Instruction No. 22.

71. The court erred in giving Instruction No. 23.

72. The court erred in giving Instruction No. 24.

73. The court erred in giving Instruction No. 25.

74. The court erred in giving Instruction No. 26.

75. The court erred in giving Instruction No. 27.

76. The court erred in giving Instruction No. 28.

77. The court erred in giving Instruction No. 29.

78. Error of the court in overruling plaintiff's in error motion for new trial.

79. Error in the proceedings of the court in the judgment made and entered in this case.

80. The sentence of the court was erroneous and excessive.

Plaintiff in error files herewith transcript of proceedings had by the District Court of Scotts Bluff County, Nebraska and by reference make the same a part hereof.

Plaintiff in error prays that a writ of error issued out of [fols. 10-11] this court to the District Court of Scotts Bluff County, Nebraska, suspending the sentence herein and that this court take jurisdiction of said proceedings, review the same, and upon review, the judgment of the District Court of Scotts Bluff County, Nebraska, be vacated and that said cause be dismissed and for such other and further relief as justice may require.

Agapita Gallegos, By Robert G. Simmons, Jr., His Attorneys.

[fol. 12] IN COUNTY COURT OF SCOTTS BLUFF COUNTY

County Court Criminal Docket

Before Ted R. Feidler, County Judge

STATE OF NEBRASKA

vs.

AGAPITA GALLEGOS

RECORD OF PROCEEDINGS

October 12th, 1949 Chauncey C. Sheldon made complaint as follows:

IN THE COUNTY COURT OF SCOTTS BLUFF COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff,

vs.

AGAPITA GALLEGOS, Defendant

COMPLAINT

STATE OF NEBRASKA,
County of Scotts Bluff, ss:

The Complaint and Information of Chauncey C. Sheldon, County Attorney of the County of Scotts Bluff, Nebraska, made in the name of the State of Nebraska, before me, the undersigned, Ted R. Feidler, County Judge within and for

said County, this 12th day of October, A. D. 1949, who being duly sworn, on oath says that Agapita Gallegos defendant, on or about the 1st day of October, 1948, in the County of Scotts Bluff and State of Nebraska, then and there being, did then and there, wilfully and unlawfully, maliciously, feloniously, and purposely, but without premiditation and deliberation, strike, beat and wound one Genovesa Carrillo with a certain blunt instrument, and as a result thereof she died on or about the 1st day of October, 1948; defendant thus committed murder in the second degree, contrary to the form of the statutes in such cases made and provided; [fol. 13] and against the peace and dignity of the People of the State of Nebraska.

Chauncey C. Sheldon.

Subscribed and sworn to before me this 12th day of October, 1949. Ted R. Feidler, County Judge, by Georgene Schrader, Clerk of the County Court.

October 12th, 1949. Issued Warrant and delivered same for service.

October 13th, 1949. Warrant returned endorsed as follows:

STATE OF NEBRASKA,
County of Scotts Bluff, ss:

Received this warrant 10-12-49 and pursuant to the command thereof I have arrested the within named Agapita Gallegos and now have his body before the Court.

Dated this 13th day of Oct., 1949.

Mahlon C. Morgan, Sheriff.

Fees

Arrest	$ 1.00
Mileage	320.00
Total	$341.00

October 13th, 1949. Agapita Gallegos appeared and plead guilty to the complaint. J. W. Lopez was duly sworn as interpreter. On consideration whereof the court finds that a crime has been committed and that there is probable cause to believe that Agapita Gallegos committed the offense charged in said complaint. The said Agapita Gal-

legos is therefore committed to the County Jail of Scotts [fol. 14] Bluff County, Nebraska, there to remain until he be discharged by due course of law.

October 13, 1949. Transcript.

Ted R. Feidler, County Judge.

[fol. 15] IN THE COUNTY COURT OF SCOTTS BLUFF COUNTY, NEBRASKA

[Title omitted]

HEARING ON ARRAIGNMENT—October 13, 1949

APPEARANCES

Mr. Millard F. Cluck, Jr., Deputy County Attorney, appearing on behalf of plaintiff.

Mr. J. W. Lopez, appearing as Interpreter.

Georgene Shrader, Clerk of the Court.

Mahlon C. Morgan, County Sheriff.

Be it remembered, that on the 13th day of October, 1949, the defendant, Agapita Gallegos, was present in open Court and was duly arraigned upon the Complaint filed against him.

[fol. 16] Mr. J. W. Lopez sworn as interpreter.

The Court: Will you ask the defendant to stand. Mr. Lopez asks defendant to stand.

Mr. Cluck: May it please the Court.

(Whereupon Mr. Cluck read the complaint.)

The Court: Mr. Lopez, it is our understanding that the defendant does not understand English. Will you now interpret to him what the complaint charges against him.

(Mr. Lopez interprets complaint to defendant.)

The Court: Let the records show that Mr. Lopez interpreted in Spanish to the defendant the complaint which has been read to him by Mr. Millard F. Cluck, Jr., Deputy County Attorney.

Mr. Lopez will you now ask him whether he understands what the complaint charges against.

Mr. Lopez: He doesn't quite understand.

The Court: Will you explain it to him further.

Mr. Lopez: He understands now.

The Court: Will you ask him now whether he desires to plead guilty or not guilty.

Mr. Lopez for Defendant: I plead guilty.

The Court: The punishment for that is beyond the jurisdiction of this Court so it is ordered that this case be bound over to District Court.

I am not going to fix any bond at this time unless he requests it.

Mr. Lopez for Defendant: I have no way of requesting for one.

The Court: That is all here this morning.

Hearing concluded.

[fol. 17] IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff,

vs.

AGAPITA GALLEGOS, Defendant

INFORMATION

Of the Regular May Term of the District Court of Scotts Bluff County, Nebraska, in the year A. D. 1949, comes Chauncey C. Sheldon the duly elected, qualified and acting County Attorney of Scotts Bluff County, Nebraska, prosecuting in the name and by the authority and on behalf of the State of Nebraska, information makes and gives the court to understand and be informed that Agapita Gallegos defendant on or about the 1st day of October, 1948, in the County of Scotts Bluff and State of Nebraska, then and there being, did then and there, wilfully, unlawfully and feloniously, maliciously and purposely, but without premeditation and deliberation, strike, beat and wound one Genovesa Carrillo with a certain blunt instrument, and as a result thereof she died on or about the 1st day of October, 1948; defendant thus committed murder in the second degree, contrary to the form of the statutes in such case

made and provided and against the peace and dignity of the people of the State of Nebraska.

Chauncey C. Sheldon, County Attorney of Scotts Bluff County, Nebraska.

[fol. 18] STATE OF NEBRASKA,
County of Scotts Bluff, ss:

Chauncey C. Sheldon, being duly sworn according to law, says the facts in his within information are true as he verily believes.

Chauncey C. Sheldon, County Attorney of Scotts Bluff County, Nebraska.

Subscribed in my presence and sworn to before me October 13, 1949. Chris Kelsen, Jr., Clerk of the District Court of Scotts Bluff County, Nebraska, by Helen E. Bauer, Deputy. (Seal.)

[fol. 19] IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY

[Title omitted]

APPOINTMENT OF COUNSEL

Now on this 15th day of October, 1949, it appearing to the court that the defendant in the above entitled case has been indicted for an offense which is punishable by imprisonment in the penitentiary and that said defendant has signed an affidavit in due form wherein under oath he stated that he had no property of any nature, kind or description; that he had no funds and was unable to procure any funds and has not the ability to procure counsel.

It is therefore found that said defendant is entitled to have counsel appointed for him by the court. The court hereby appoints as an attorney to represent said defendant, Robert G. Simmons, Jr.

C. G. Perry, Judge of the District Court.

[fol. 20] IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY

[Title omitted]

HEARING ON PLEA—October 25, 1949

APPEARANCES

Mr. Chauncey C. Sheldon, County Attorney, Appearing for the plaintiff.

Mr. Robert G. Simmons, Jr., Attorney at Law, Appearing for the defendant.

Be it remembered, that on the 25th day of October, 1949, the defendant, Agapito Gallegos, was present in open court, having been duly arraigned upon the Information filed against him, entered his plea thereto.

[fol. 21] Also Present in Court Room:

Mr. Mahlon C. Morgan, Sheriff, Mr. J. W. Lopez, Interpreter, and Mr. R. B. Nichols, Court Reporter.

The Court: Mr. Lopez was sworn as Interpreter. I will swear him again if you like.

Mr. Simmons: It doesn't make any difference.

The Court: Agapito Gallegos, you were here on October 15, 1949.

(Reporter's note: All defendant's remarks through Interpreter.)

The Defendant: Yes, sir.

The Court: At that time, Mr. Sheldon, County Attorney, read to you the Information filed here.

The Defendant: Yes, sir.

The Court: After which Mr. Lopez interpreted it for you?

The Defendant: Yes, sir.

The Court: And he at that time explained to you what you were charged with?

The Defendant: Yes, sir.

The Court: After which the Court explained the nature of the offense?

The Defendant: Yes, sir.

The Court: And the punishment?

The Defendant: Yes, sir.

The Court: And your right to be represented by counsel?

The Defendant: Yes, sir.

[fol. 22] The Court: And you then requested that the Court appoint you counsel?

The Defendant: Yes, sir.

The Court: And the Court since that time, after you filed your poverty affidavit, appointed Mr. Robert G. Simmons, Jr., of Scottsbluff as your counsel?

The Defendant: Yes, sir.

The Court: And Mr. Simmons is now present in open court with you?

The Defendant: Yes, sir.

The Court: The court now ask you how you plead to that information, guilty or not guilty?

The Defendant: Not guilty.

The Court: Let the plea be noted and that the cause will be set for hearing at the present term of the District Court in and for Scotts Bluff County, Nebraska.

Hearing Concluded.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 23] IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY

[Title omitted]

STIPULATION

Comes now the plaintiff, represented by the County Attorney of Scotts Bluff County, Nebraska, Chauncey C. Sheldon, and the defendant, represented by his attorney, and stipulate as follows:

1. That the defendant is not a citizen of the United States but is a citizen of the Republic of Mexico.

2. That the defendant does not understand the English language in any particular; *[that the defendant is uneducated and cannot read either English or Spanish.]

The State of Nebraska, By Chauncey C. Sheldon, County Attorney. Agapita Gallegos, By Robert G. Simmons, Jr., His Attorney.

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* Struck out in copy.

[fol. 24] IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY

[Title omitted]

STIPULATION

Comes now the plaintiff by and through the county attorney of Scotts Bluff County, Nebraska and the defendant and stipulate as follows: That if William E. Ward of El Paso, El Paso County, Texas, is called as a witness in this action or if his deposition is taken, that he would testify as follows:

1. That he is an attorney at law duly authorized to practice law in the State of Texas.

2. That he has made an examination of the records of all courts in El Paso County, Texas for the months of August, September and October, 1949 for the purpose of attempting to ascertain what charges, if any, were ever filed against Agapita Gallegos.

3. That in making such search he was unable to find that any charge of any kind had been filed in any court against Agapita Gallegos during those months and was unable to find any record or other evidence or indication that Agapita Gallegos had been brought before any magistrate in said county during said period.

4. That he has made an examination or a search to ascertain if any immigration complaint had been filed against said Agapita Gallegos and was unable to find that any complaint had been filed in El Paso County.

[fol. 25] 5. That as a result of said search he found that Agapita Gallegos was booked with the sheriff's office of El Paso County on a charge of vagrancy and with a notation to hold for the immigration authorities; that the records of the sheriff's office demonstrate that said Agapita Gallegos was in the custody of the sheriff's office of El Paso County at least from September 23, 1949 until released to the sheriff of Scotts Bluff County, Nebraska.

The State of Nebraska, Plaintiff, By Chauncey C. Sheldon, County Attorney. Agapita Gallegos, By Robert G. Simmons, Jr., His Attorney.

It is expressly understood and agreed by and between the State and the defendant herein that there shall be retained and reserved on the part of the State the unqualified right

to interpose any and all appropriate objections to the admissibility of the above and foregoing stipulation as evidence at the time of trial herein.

C. C. S., R. G. S.

[fol. 26] IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY

[Title omitted]

JOURNAL ENTRY OF TRIAL

Now on this 19th day of November, 1949, it being one of the days of the regular October Term of the District Court of Scotts Bluff, County, Nebraska, the Court convened at 9:30 o'clock A.M. pursuant to the adjournment at the previous day.

The defendant was present in open Court with his attorney, Robert G. Simmons, Jr., and the State of Nebraska was represented by Chauncey C. Sheldon, County Attorney of Scotts Bluff County, Nebraska.

The defendant continued the production of evidence at the conclusion of which the defendant rested his case.

Whereupon the State of Nebraska adduced evidence in rebuttal. The defendant then rested and both the State of Nebraska and the defendant rested.

At the hour of 11:00 o'clock A.M. the jury was admonished by the Court and a recess taken until 1:00 o'clock P.M.

At 1:00 o'clock P.M., Court was convened and the defendant was present in open Court with his attorney, Robert G. Simmons, Jr. and the State of Nebraska was represented by Chauncey C. Sheldon, County Attorney of Scotts Bluff County, Nebraska. Argument of counsel was made to the jury by respective counsel.

The jury was then instructed in writing by the Court and at the hour of 4:12 o'clock P.M. the jury retired for [fol. 27] deliberation in charge of the bailiff. At the hour of 9:24 o'clock P.M., the jury announced that they had arrived at a verdict.

At the hour of 9:40 o'clock P.M. the defendant was present in open Court with his attorney, Robert G. Simmons, Jr., and the jury returned into open Court with their verdict.

The jury returned a verdict finding the defendant guilty of manslaughter. The jury was asked if it was their verdict

and if they adherred to it, whereupon the jury replied in the affirmative.

The jury was then discharged.

By the Court, C. G. Perry, District Judge.

[fol. 28] In the District Court of Scotts Bluff County

[Title omitted]

Verdict of Jury

State of Nebraska,

County of Scotts Bluff, ss.

We, the Jury duly impanelled and sworn in the above entitled cause do find the defendant guilty of manslaughter.

Chris Kelsen, Jr., Clerk, Dist. Court.

Dated this *19th* day of November, *1949*.

C. R. McVinua, Foreman.

[fol. 29] In the District Court of Scotts Bluff County

[Title omitted]

Motion for a New Trial

Comes now the defendant and moves the court to grant a new trial in the above entitled matter for the following reasons:

1. Irregularity in the proceedings of the prevailing party by which the defendant was prevented from having a fair trial.
2. Misconduct of the prevailing party.
3. That the verdict is not sustained by sufficient evidence.
4. That the verdict is contrary to law.
5. Errors of law occurring at the trial and excepted to by the defendant.
6. For failing to submit to the jury proposed Instruction No. 1 submitted by the defendant.
7. For failing to submit to the jury proposed Instruction No. 2 submitted by the defendant.

8. For failing to submit to the jury proposed Instruction No. 3 submitted by the defendant.

9. For failing to submit to the jury proposed Instruction No. 4 submitted by the defendant.

10. For failing to submit to the jury proposed Instruction No. 5 submitted by the defendant.

11. For failing to submit to the jury proposed Instruction No. 6 submitted by the defendant.

[fol. 30] 12. For failing to submit to the jury proposed Instruction No. 7 submitted by the defendant.

13. For failing to submit to the jury proposed Instruction No. 8 submitted by the defendant.

14. For failing to submit to the jury proposed Instruction No. 9 submitted by the defendant.

15. For failing to submit to the jury proposed Instruction No. 10 submitted by the defendant.

16. For failing to submit to the jury proposed Instruction No. 11 submitted by the defendant.

17. For failing to submit to the jury proposed Instruction No. 12 submitted by the defendant.

18. For failing to submit to the jury proposed Instruction No. 13 submitted by the defendant.

19. For failing to submit to the jury proposed Instruction No. 14 submitted by the defendant.

20. For failing to submit to the jury proposed Instruction No. 15 submitted by the defendant.

21. For failing to submit to the jury proposed Instruction No. 16 submitted by the defendant.

22. For failing to submit to the jury proposed Instruction No. 17 submitted by the defendant.

23. For failing to submit to the jury proposed Instruction No. 18 submitted by the defendant.

24. For failing to submit to the jury proposed Instruction No. 19 submitted by the defendant.

25. For failing to submit to the jury proposed Instruction No. 20 submitted by the defendant.

[fol. 31] 26. For failing to submit to the jury proposed Instruction No. 21 submitted by the defendant.

27. For failing to submit to the jury proposed Instruction No. 22 submitted by the defendant.

28. For failing to submit to the jury proposed Instruction No. 23 submitted by the defendant.

29. For failing to submit to the jury proposed Instruction No. 24 submitted by the defendant.

29½. Misconduct of the jurors in separating during their deliberations.

30. For submitting to the Jury Instruction No. 1.
31. For submitting to the Jury Instruction No. 2.
32. For submitting to the jury Instruction No. 3.
33. For submitting to the jury Instruction No. 4.
34. For submitting to the jury Instruction No. 5.
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57. For submitting to the jury Instruction No. 28.
58. For submitting to the jury Instruction No. 29.

Agapita Gallegos, Defendant, by Robert G. Simmons, Jr., His Attorney.

[fol. 33] IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY

[Title omitted]

JOURNAL ENTRY OF JUDGMENT

Now on this 23rd day of November, 1949, the same being one of the judicial days of the October, A. D., 1949, term of the District Court of Scotts Bluff County, Nebraska, the following proceedings were had and done in this cause:

The defendant, Agapito Gallegos, was present in open Court with his attorney, Robert G. Simmons, Jr., and the State was represented by Millard F. Cluck, Jr., Deputy County Attorney of Scotts Bluff County, Nebraska.

Argument on motion for new trial was expressly waived by the defendant's counsel. The motion was accordingly overruled.

The Court advised the defendant as to the verdict of the jury. Whereupon the defendant was asked by the Court if he had anything to say why he should not be sentenced under the verdict of the jury. No sufficient reason was given.

The Court being fully advised in the premises finds that the defendant, Agapito Gallegos, has been found guilty of manslaughter; that the defendant should be committed to the State Penitentiary at Lancaster, Lincoln, Nebraska, for a period of ten (10) years at hard labor, Sundays and holidays excepted; and that he pay the costs of prosecution.

[fols. 34-35] (Journal Entry Concluded)

It is therefore ordered and adjudged that the defendant, Agapito Gallegos, is guilty of manslaughter; that the defendant be, and he hereby is, committed to the State Penitentiary at Lancaster, Lincoln, Nebraska, for a period of ten (10) years at hard labor, Sundays and holidays excepted; and that he pay the costs of prosecution.

Commitment ordered accordingly.

By the Court. (S) C. G. Perry, District Judge.

[fols. 36-37] IN SUPREME COURT OF NEBRASKA

Error to the District Court of Scotts Bluff County.

No. 32781

AGAPITA GALLEGOS, Plaintiff in error.

v.

THE STATE OF NEBRASKA, Defendant in error.

JUDGMENT—June 15, 1950.

This cause coming on to be heard upon proceedings in error to the district court of Scotts Bluff county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and hereby is, affirmed; that Scotts Bluff county, in the name of the State of Nebraska, defendant in error, pay all costs incurred herein, taxed at $—; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Wenke, Judge.

Robert G. Simmons, Chief Justice

[fol. 38] IN SUPREME COURT OF NEBRASKA

32781

GALLEGOS

v.

STATE

1. Corpus delicti is composed of two elements, the fact or result forming the basis of the charge and the existence of a criminal agency as the cause thereof. Homicide corpus delicti is not established until it is proved that a human being is dead, and the death occurred as the result of the criminal agency of another.

2. A conviction for felony will not be sustained when the only evidence of guilt is the extra-judicial confession of the defendant that a crime has been committed.

3. While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, with slight corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation.

4. In laying a foundation in a criminal case for the admission of a confession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats.

5. The question of whether or not in the first instance the State has laid a proper and sufficient foundation for the admission of such evidence is one of law for the court, and if the court determines as a matter of law that no sufficient foundation has been laid then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact to be determined by the jury.

OPINION—Filed June 15, 1950.

[fol. 39] Heard before Carter, Messmore, Chappell, Wenke, and Boslaugh, JJ.

WENKE, J.:

A jury in the district court for Scotts Bluff County found the defendant, Agapita Gallegos, guilty of manslaughter. His motion for a new trial was overruled and he was sentenced to serve ten years in the penitentiary. To review the record of his conviction and sentence the defendant has instituted this error proceeding.

For convenience we shall refer to the plaintiff in error as the defendant.

Defendant contends that the corpus delicti, which means that a crime has actually been committed, has not been established. Corpus delicti is composed of two elements, the fact or result forming the basis of the charge and the existence of a criminal agency as the cause thereof. 23 C. J. S., Criminal Law, s. 916, p. 181. "Homicide corpus delicti is not established until it is proved that a human being is dead, and the death occurred as the result of the

criminal agency of another." Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539.

The confessions of the defendant, the first on September 23, 1949, and the second on October 1, 1949, fully detail the crime and its commission. Defendant therein confessed that in the early part of October 1948, while Mrs. Genovesa Carillo was living with him and his two children in a tenant house located on a farm near Minatare in Scotts Bluff County, Nebraska, he got into an argument with her; that the argument started while they were getting ready to retire; that while arguing he picked up a piece of stove wood; that he hit her with this piece of wood, the blow being on the head and just behind the left ear; that when struck she fell to the floor in a sort of dazed condition but continued to talk; that while she was on the floor he hit her twice with the same piece of wood and in about the same place; that some blood flowed from her head and formed a spot on the floor; that she died from the blows; that this all took place in the east room of the two-room tenant house in which they were living; that he buried her the next day, just after dark, at a point east of the tenant house; that he dug the grave north and south, placing her with her head to the north; that he [fol. 40] wrapped her body in a blanket and placed a handkerchief in her mouth to keep the dirt from getting in; and that she had on one of his overalls and a lady's shirt, but no shoes.

We said in Sullivan v. State, 58 Neb. 796, 79 N. W. 721, that; "The uniform doctrine of the American courts is that a conviction for felony will not be sustained when the only evidence of guilt is the extrajudicial confession of the defendant that a crime has been committed. His confession may be sufficient to prove his own connection with the alleged criminal act, but there must in all cases be proof aliunde of the essential facts constituting the crime."

As stated in 23 C. J. S., Criminal Law, s. 916, p. 182: "The corpus delicti cannot be presumed, but must be established by evidence sufficient to show the commission of a crime. Extrajudicial admissions or confessions of the accused are not alone sufficient to establish the corpus delicti, but ordinarily may be considered in connection with other evidence in the establishment thereof."

See, also, Cryderman v. State, 101 Neb. 85, 161 N. W. 1045; Egbert v. State, 113 Neb. 790, 205 N. W. 252; Lim-

merick v. State, 120 Neb. 558, 234 N. W. 98; Whomble v. State, 143 Neb. 667, 10 N. W. 2d 627; Clark v. State, 151 Neb. 348, 37 N. W. 2d 601; Reyes v. State, *supra*.

However, as stated in 23 C. J. S., Criminal Law, s. 916, p. 184: "* * * although there is authority which holds that the corpus delicti must be established by independent evidence alone and the extrajudicial statements, admissions, or confession of accused cannot be used in aid of the establishment of any necessary element thereof, as a general rule it is not required that the corpus delicti shall be established by independent evidence alone. Extrajudicial admissions, declarations, or confessions of accused may be considered in connection with other independent evidence in determining whether the corpus delicti is sufficiently proved; and it is sufficient when the evidence independent of the confession, together with the confession, establishes the corpus delicti. It is not required that the suppletory evidence be conclusive in its character; and slighter evidence of the corpus delicti is sufficient for its establishment where the commission of the crime has been confessed by accused; but it is necessary that there be such extrinsic corroborative circumstances as will, taken in connection with the confession, produce a conviction of guilt."

[fol. 41] That we have followed this general rule is evidenced by many holdings of this court. After stating the foregoing, quoted from Sullivan v. State, *supra*, the court therein went on to say: "But while a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, with slight corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation. Discussing this question, Nelson, C. J., in People v. Badgley, 16 Wend. (N. Y.) 53, said: 'Full proof of the body of the crime, the corpus delicti, independently of the confession, is not required by any of the cases; and in many of them slight corroborating facts were held sufficient.' The doctrine of this case was distinctly approved in People v. Jaehne, 103 N. Y. 182, where it was held that equivocal circumstance offered as proof of the corpus delicti, might be interpreted in the light of the prisoner's confession and the fact under investigation be thus given a criminal aspect. In State v. Hall, 31 W. Va. 505, the court, considering this question, said: 'We know of no decisions anywhere that hold the admissions of the defendant are

not competent evidence tending to prove the corpus delicti, but they certainly are competent evidence tending to prove that the crime charged has been committed.' It has often been held in cases where there was no direct proof of the crime, as in prosecutions for adultery and trials for homicide where the body of the deceased had not been found, that the defendant's extrajudicial confession, in connection with other incriminating circumstances, would warrant a conviction. (Ryan v. State, 100 Ala. 94; State v. Lamb, 28 Mo. 218; State v. Patterson, 73 Mo. 695; Commonwealth v. McCann, 97 Mass. 580; United States v. Williams, 1 Cliff. (U. S.) 20; United States v. Gilbert, 2 Sum. (U. S.) 19; Commonwealth v. Tarr, 4 Allen (Mass.) 315.)"

"The rule that the corpus delicti cannot be proved by the confession of the defendant is true as a general proposition, yet confessions or admissions may be considered in connection with the other evidence to establish the corpus delicti. It is not necessary to prove the corpus delicti by evidence entirely independent and exclusive of the confession or admissions. Groover v. State, 82 Fla. 427; 26 A. L. R. 380; 17 R. C. L. 64, Sec. 69." Limmerick v. State, *supra.*

[fol. 42] This principle has often been reaffirmed by this court. See, Egbert v. State, *supra;* Whomble v. State, *supra;* Clarke v. State, *supra.*

Other than the confessions there is evidence that defendant, an illiterate Mexican beet field worker about 38 years of age, returned to Nebraska from Mexico shortly after Christmas 1947; that he had with him at that time his son, about 10 years of age, his daughter, about 13 years of age, and a Mexican woman between 35 and 40 years of age by the name of Mrs. Genovesa Carrillo, who he held out as his wife; that in April 1948 he obtained employment with a farmer by the name of Carl Mowry who lived about 15 miles northeast of Scottsbluff and moved into a tenant house on his farm; that defendant and Mrs. Carrillo were having trouble between themselves because she didn't always stay with him but moved around and lived with others; that because of this condition Carl Mowry made them leave his farm; that in September 1948 he obtained employment with Alex Bauer to help harvest beets; that the Alex Bauer farm is located 6 miles east and ¾ mile north of Scottsbluff in Scotts Bluff County, Nebraska; that in the first part of October 1948 defendant, with his children and this woman,

then moved into a two-room tenant house on the Bauer farm; that beginning sometime in October Bauer did not see the woman around the place; that about the middle of the month, when defendant and his two children were in the field, Bauer asked defendant where she was; that defendant waived his hands in a manner which Bauer took to mean that she was gone; that thereafter Bauer did not see her again; that defendant, with his two children, stayed at the Bauer place until the last of October 1948; that thereafter defendant, with his two children, left the Bauer place and worked for Paul Franco for about a week; and that shortly thereafter they, defendant and his two children, left for Mexico.

Mrs. Genovesa Carrillo is described as a Mexican woman about 35 to 40 years of age, 5 feet 1 or 2 inches in height, and weighing about 140 pounds. That she was fairly light complected for a woman of that nationality and had dark brown wavy hair of average length.

There is also evidence that on September 23, 1949, the authorities of Scotts Bluff County went out to the farm located 6 miles east and ¾ mile north of Scottsbluff and at a point east of the two-room tenant house, which defend- [fol. 43] ant had occupied while working for Alex Bauer, they discovered a grave; that they did not remove the body from the grave on that day but came back on the 24th and then uncovered it and caused it to be lifted therefrom; that the body was buried with its head to the north; that it apparently had been wrapped in a blanket when buried; that it was in such condition that it could be removed from the grave in one piece; that the hair of the corpse was dark brown, wavy, and longer than that of a man; that it appeared to be the hair of a woman; that the body had on overalls but no shoes; that it appeared to be the body of a lady of Mexican or Spanish origin; and that there was observed a dark brown stain or spot on the floor in the east room of the tenant house at the place where defendant pointed out she had fallen when hit and where she had bled.

We think this evidence, together with the confessions, is sufficient to establish the corpus delicti and that defendant was guilty, beyond a reasonable doubt, of the crime of which he has been convicted and for which he has been sentenced.

Defendant also contends that the court erred in admitting in evidence the confessions of September 23, 1949, and

October 1, 1949, already referred to, and the evidence of his admission of guilt made at the preliminary hearing on the complaint had by the county court for Scotts Bluff County on October 13, 1949. This contention is based on the fact that they were involuntarily made. If that be true the contention is well made but, on the contrary, if they were voluntarily made it needs no citation of authorities to state that they were admissible and properly for consideration by the jury.

As to the determination of that issue we said in Kitts v. State, 151 Neb. 679, 39 N. W. 2d 283, that:

"In laying a foundation in a criminal case for the admission of a confession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats.

[fol. 44] "The question of whether or not in the first instance the State has laid a proper and sufficient foundation for the admission of such evidence is one of law for the court, and if the court determines as a matter of law that no sufficient foundation has been laid then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact to be determined by the jury."

We shall not set out all the detailed facts as they relate to this issue as the record is voluminous and it would serve no useful purpose. Chronologically the evidence discloses the defendant was arrested by the authorities of El Paso County, Texas, on Monday, September 19, 1949, while he was working on a farm near Ysleta, Texas. At that time he gave an assumed name and professed not to know anyone by the name of Agapita Gallegos. He was taken into custody because of information given the authorities by the Immigration Department. Defendant was committed to the jail at El Paso and questioned on that day and again on the following day, Tuesday, September 20, 1949. He was again questioned on Thursday, September 22, 1949. At that time he admitted his identity and that he had previously been in Nebraska. He was again questioned on Friday, September 23, 1949. At that time he made the confession which has

already been referred to. On September 27, 1949, defendant was turned over to the authorities of Scotts Bluff County, Nebraska, he having voluntarily signed a waiver of extradition. He was thereupon returned to Nebraska, arriving in the early morning of September 29, 1949. He was immediately committed to the jail at Scottsbluff under a complaint filed against him on September 24, 1949, charging him with first degree murder.

During the time defendant was held in jail at El Paso no charges were filed against him in any state court nor was he brought before any magistrate. He was not represented by counsel and had not asked to be.

After defendant was returned to Nebraska the authorities of Scotts Bluff County talked to him on October 1, 1949, and he made the confession already referred to as having been made on that date. He was held in jail at Scottsbluff until October 13, 1949, before being brought before the county judge for preliminary hearing. The complaint of first degree murder filed against him on September 24, 1949, was dismissed on October 12, 1949, and a new complaint charg- [fol. 45] ing him with second degree murder was filed against him on that date. The latter is the complaint on which preliminary hearing was had. Defendant was not represented by counsel at the preliminary hearing or at any time prior thereto and the record discloses that he never asked to be. However, subsequent thereto he was at all times represented by counsel appointed by the court.

While there is testimony given by the defendant from which the jury could have found that the confessions made were involuntary due to the manner in which defendant was held in confinement, the treatment received while so held, and the threats made; however, the testimony of the authorities in charge, both at El Paso and Scottsbluff, deny these facts and when their testimony is taken together with certain testimony of the defendant, it presents a factual situation from which the jury could properly find that the confessions were freely and voluntarily made. This includes the issue presented by the evidence offered as to whether or not the complaint was properly translated at the preliminary hearing so it was understood by the defendant in making his plea thereto. It also includes the question of whether or not he understood the nature or degree of the crime with which he was charged. These issues both relate

themselves directly to the question of whether or not he understood what he was doing when he made his admission of guilt and consequently relate directly to whether it was voluntarily or involuntarily made.

In regard to how soon after a person is arrested he must be given a preliminary hearing we said in Maher v. State, 144, Neb. 463, 13 N. W. 2d 641: "The question as to the time in which the defendant should be given a preliminary hearing is a question for the court. There can be no precise length of time, after the arrest of a person, in which he must be given a hearing. The theory of the law is that he must be given a hearing as soon as possible. A person charged should be given a preliminary hearing just as soon as the nature and circumstances of the case will permit."

As already stated the testimony as to what took place during the time defendant was held in custody both in the El Paso jail and that in Scottsbluff is voluminous and detailed. It sets forth all the facts as they relate to the taking of the two confessions and the admission of guilt at the preliminary hearing. This is the proper foundation for [fols. 46-49] their admission. The question of whether or not the foundation laid for their admission is sufficient is, in the first instance, one of law for the court. Here the court, in the first instance, heard all of the evidence relating thereto and determined that sufficient foundation had been laid for their admission. The evidence was then presented to the jury and the question as to their character, whether voluntary or involuntary, was submitted to it by the court's instructions Nos. 12, 13, and 14. We find the facts and circumstances relating to the giving of the two confessions and the admission of guilt at the preliminary hearing justified the trial court in admitting them in evidence in the first instance and submitting their character, whether voluntary or involuntary, to the jury. See Kitts v. State, *supra*.

The defendant does not understand our language and an interpreter was always used except in those instances where the El Paso authorities were able to converse with him in his native language. The record does not sustain defendant's charge that these interpreters violated or abused the functional purpose for which they were serving. Nor was the plea entered by the defendant at the preliminary hearing in violation of or contrary to any statutory requirement relating thereto.

From the record we find the defendant had a fair trial and that the conviction and sentence should be affirmed.

Affirmed.

[fols. 1-5-77] IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff,

vs.

AGAPITO GALLEGOS, Defendant

Bill of Exceptions—Filed February 20, 1950

APPEARANCES:

Mr. Chauncey C. Sheldon and Mr. Millard F. Cluck, Jr., appearing for plaintiff. Mr. Robert G. Simmons, Jr., appearing for def-ndant.

[fol. 78] HON. TED R. FEIDLER, called as a witness on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct examination.

By Mr. Sheldon:

406 Q. Your name is Ted R. Feidler?

A. Yes, sir.

407 Q. And you are the County Judge in and for Scotts Bluff County, Nebraska?

A. I am.

408 Q. And were you acting and serving in that capacity on the 12th day of October of this year?

A. I was.

409 Q. And on that date did there appear before you for arraignment a defendant named Agapita Gallegos?

A. He did.

410 Q. And was he arraigned in your court?

A. He was.

411 Q. Do you recall who else, if anyone, was present at the time of that arraignment?

A. Mr. Millard Cluck was representing the state, and Mr. [fol. 79] Lopez was acting as Interpreter for the defendant, and I think my Clerk, Georgene Shrader, was also present.

Mr. Simmons: May I ask a question here?

By Mr. Simmons:

412 Q. You said, "Interpreter for the defendant."

A. There was an Interpreter present there who interpreted the defendant's testimony.

By Mr. Simmons:

413 Q. You didn't mean that he was an employee of the defendant?

A. No. I don't know who employed him.

Mr. Sheldon continuing:

414 Q. Do you recall Deputy Sheriff Hedge being present?

A. I don't remember for sure.

415 Q. Well, do you recall a representative of the Sheriff's office being present?

A. Yes. Somebody brought him in.

416 Q. And by whom was the complaint read, Judge Feidler?

Mr. Simmons: I object to any further questioning along this line for the reason that there is no evidence before the Court showing the corpus delicti or evidence showing that any crime was committed, or that the body found was that of any person named in the information in this action.

The Court: Overruled.

Mr. Sheldon: You may answer.

[fol. 80] A. The complaint was read by Mr. Millard Cluck.

417 Q. Then what, if anything, occurred.

Mr. Simmons: May the objection that I made concerning the absence of proof of the commission of any crime go to all of this line of testimony?

The Court: Very well.

A. Then Mr. Cluck handed a copy of the complaint to Mr. Lopez and then Mr. Lopez appeared to be reading it out loud in a foreign language to the defendant.

418 Q. Was the copy of the complaint, which you referred to Mr. Cluck having handed to Mr. Lopez, the same copy from which Mr. Cluck had, himself, read?

The Witness: Will you read that?

(Question read by the court reporter.)

A. Yes, it was.

419 Q. Where was the original complaint at the time these proceedings were going on?

A. It was filed in the County Court and I had it on my desk before me.

420 Q. While Mr. Cluck was reading from the copy of the complaint did you follow the original of the complaint which you had before you?

A. I ordinarily do that, whether I did it partially or totally in this case I don't remember.

[fol. 81] 421 Q. In other words, that is your practice, but you have no independent recollection as to whether you did or did not in this case, is that true?

A. That's right.

422 Q. Now, do you recall whether or not the door to your court rooms were opened at the time this arraignment was being carried on?

A. I do not.

423 Q. Were there any threats, promises, inducements or intimidating gestures made to or in the presence of the accused during the arraignment?

Mr. Simmons: Just a minute. I object to that as incompetent, irrelevant and immaterial, and an improper way to prove any statements made by the defendant were made under voluntary circumstances.

Mr. Sheldon: I think that is the very crux of it.

The Court: Overruled.

A. There were not.

424 Q. Did the defendant enter a plea at that time?

A. He did.

Mr. Simmons: I object to that and move to strike the answer and object for the reason that there is no evidence [fol. 82] that the defendant understood what was presented to him.

Mr. Sheldon: If the Court please, it may be that foundation is a little lacking in that respect, however, we will establish that by Mr. Lopez.

The Court: That will be overruled.

Mr. Sheldon: You may answer, if you will, Mr. Feidler.

Mr. Simmons: It is yes or no, I believe.

The Witness: What is the question?

(Question and answer read by reporter.)

425 Q. What was that plea?

Mr. Simmons: Just a minute, I object. May I cross-examine as to foundation?

The Court: You may.

Cross-examination.

By Mr. Simmons:

426 Q. Judge Feidler, you requested that a stenographer be present at this time?

A. I did.

427 Q. And a transcript was made of the proceedings in the County Court?

A. Yes.

[fol. 83] (Whereupon a copy of Hearing on Arraignment in County Court of Scotts Bluff County, Nebraska, was marked as Defendant's Exhibit No. 4, by court reporter for identification.)

428 Q. Now, do you know where the original of the transcript is that you referred to?

A. I think it came up as a part of the record.

429 Q. Handing you the original court file in this matter, I will ask you if you can find the original in the court file?

A. (Witness examines files:) It just appears to be a copy here.

430 Q. That is a carbon copy?

A. Yes.

431 Q. Handing you Defendant's Exhibit No. 4, I will ask you if that is a copy of what appears to be in the original court file?

A. Without reading it word for word, it appears to be identical.

432 Q. Will you examine it to see if it is your recollection of what occurred in the court room during this episode to which you have—would you read Exhibit No. 4 so we can offer it in evidence as to it being your recollection?

Mr. Sheldon: You are offering it in evidence at this time?
Mr. Simmons: I will offer it.

STIPULATION

Mr. Sheldon: We have no objection to the transcript being [fol. 84] offered in evidence; however, we do contend that even though it is it does not tend to preclude the County Judge of giving the testimony which we have asked for here, it isn't anything that is conflicting with or contradictory with the record referred to.

We will stipulate on that that the transcript may be received:

The Court: How much of the transcript?
Mr. Sheldon: All of it, if you want it all in.
The Court: I have read it, but what I am getting at is, is this all you intend to offer?
Mr. Simmons: That is all I want to offer at the time.
The Court: It is stipulated by and between the parties hereto that Defendant's Exhibit No. 4 shall be received in evidence.

(Which said Defendant's Exhibit No. 4 so received in evidence is made a part of this record and may be found on next page hereof.)

433 Q. Handing you Defendant's Exhibit No. 4, I will ask you if that is a true—refreshing your recollection from that Exhibit, if that is a true statement of what occurred in your court room?

[fol. 85] Defendant's Exhibit No. 4 Omitted. Printed side page 15 ante.

[fol. 86] A. That is substantially what took place.

434 Q. Now, Judge, this transcript does not purport to be entirely complete—that is, the complaint is not set out verbatim here although Mr. Cluck did read it out loud, is that correct?

A: That's correct.

435 Q. When we come to the point in parenthesis that

says, "Mr. Lopez interprets complaint to defendant.", at that time Mr. Lopez spoke in some tongue which is unintelligible to you?

A. That is correct.

436 Q. And later on you asked Mr. Lopez—you said, "Mr. Lopez will you now ask him whether he understands what the complaint charges against."?

A. That is correct.

437 Q. At that point did Mr. Lopez make any statement in some tongue which you don't understand?

A. Yes, he conferred with the defendant.

438 Q. And were there answers made by the defendant or some statement?

A. He made at least one, whether he made more than one I did not understand.

439 Q. Did Mr. Lopez make more than one statement to the defendant?

Mr. Sheldon: That is objected to as no sufficient foundation laid to show whether or not the Judge knows that.

[fol. 87] 440 Q. If you know?

A. Well, as I remember, he did; he made more than one statement.

441 Q. Now, Mr. Lopez replied as set forth in the information in English—or in the exhibit in English?

A. Yes; he either said that or he says "He does not quite understand.

442 Q. Then you made the remark that is attributed to the Court?

A. Yes, I did.

443 Q. And after that was there some conversation back and forth between Mr. Lopez and Mr. Gallegos?

A. There was.

444 Q. Talking on both sides?

A. Well, it was very short; there were two or three different statements made by each party perhaps.

445 Q. You don't know what was said?

A. I do not.

446 Q. Now, do you know the date on which this complaint was filed?

A. It was filed on October 12, 1949.

447 Q. And the date of this hearing was on October 13, is that correct?

A. Yes, it was.

448 Q. Now, can you advise us as to whether or not there was another complaint ever filed against this defendant in your court?

[fol. 88] A. There was.

449 Q. On what date?

A. On September 24, 1949.

[fol. 89] 450 Q. Was a warrant issued under that complaint?

A. There was.

Mr. Simmons: Will you mark these as Exhibits?

(Whereupon a complaint and a warrant were marked as Defendant's Nos. 5 and 6 by the court reporter for the purpose of identification.)

451 Q. Handing you what the reporter has marked as Defendant's Exhibits 5 and 6, will you advise us what those are?

A. That is a complaint filed in the County Court against the defendant on September 24, 1949, and a warrant which was issued pursuant to the complaint.

452 Q. These are the originals of the files in your office?

A. Yes, they are.

Mr. Simmons: I will offer them in evidence, asking leave to substitute copies in lieu thereof.

Mr. Sheldon: No objection.

The Court: They will be received.

(Which said Defendant's Exhibits Nos. 5 and 6 so offered and received in evidence, are made a part of this record and may be found immediately following on the next two pages hereof respectively.)

[fol. 90] DEFENDANT'S EXHIBIT 5

(Copy)

IN THE COUNTY COURT OF SCOTTS BLUFF COUNTY, NEBRASKA
THE STATE OF NEBRASKA, Plaintiff,

vs.

AGAPITA GALLEGOS, Defendant

COMPLAINT

Filed Sept. 24th, 1949. Ted R. Feidler, County Judge, by Georgene Shrader, Clerk of County Court.

STATE OF NEBRASKA,
County of Scotts Bluff, ss:

The Complaint and Information of — of the County of Scotts Bluff, Nebraska, made in the name of the State of Nebraska, before me, the undersigned, Ted R. Feidler, County Judge within and for said County, this 24th day of September, A.D., 1949, who being duly sworn, on oath says that Agapita Gallegos, defendant, on or about the 1st day of October, 1948, in the County of Scotts Bluff and State of Nebraska, then and there being, did then and there, wilfully and unlawfully, feloniously, purposely, and of his deliberate and premeditated malice, strangle one Genovesa Carrillo, and as a result thereof she, the said Genovesa Carrillo, died on or about the 1st day of October, 1948; defendant thus committed murder in the first degree, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the People of the State of Nebraska.

(Signed) Chauncey C. Sheldon.

Subscribed and sworn to before me this 24th day of September, 1949. (Signed) Ted R. Feidler, County Judge, by (Signed) Georgene Shrader, Clerk of the County Court. (Seal.)

[fol. 91] DEFENDANT'S EXHIBIT 6

(Copy)

IN THE COUNTY COURT OF SCOTTS BLUFF COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff,

vs.

AGAPITA GALLEGOS, Defendant

WARRANT

Filed Oct. 3rd, 1949. Ted R. Feidler, County Judge, by Georgene Shrader, Clerk of County Court.

STATE OF NEBRASKA,
County of Scotts Bluff, ss:

To the Sheriff or any Constable of Said County:

Whereas, there has been filed with the undersigned Magistrate, in writing, the complaint and information of — of the County of Scotts Bluff, Nebraska, made in the name of the State of Nebraska, before me, the undersigned, Ted R. Feidler, County Judge within and for said County, this 24th day of September, A. D., 1949, who being duly sworn on oath says that Agapita Gallegos, defendant, on or about the 1st day of October, 1948, in the County of Scotts Bluff and State of Nebraska, then and there being, did then and there, wilfully and unlawfully, feloniously, purposely, and of his deliberate and premeditated malice, strangle one Genovesa Carrillo, and as a result thereof she, the said Genovesa Carrillo, died on or about the 1st day of October, 1948; defendant thus committed murder in the first degree, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the People of the State of Nebraska.

These are, therefore to command you forthwith to take the said accused and bring his body before me, or some other magistrate having cognizance of the case, to be dealt with according to law.

Given under my hand and seal this 24th day of September, 1949.

Ted R. Feidler, County Judge. (Seal.)

STATE OF NEBRASKA,
County of Scotts Bluff, ss:

Received this warrant —— —, 19—, and pursuant to the command thereof I have arrested the within named Agapita Gallegos and now have his body before the Court.

Dated this 3rd day of Oct., 1949.

Mahlon C. Morgan, Sheriff of Scotts Bluff County,
by —— ——, Deputy.

Fees

Arrest	$ 1.00
Mileage & Exp.	$320.
Total	$321.00

[fol. 92] 453 Q. Now, Judge, is there any record in your office of any preliminary hearing or arraignment being made upon that complaint?

A. No; that complaint was ordered dismissed by the County Attorney.

454 Q. Do you know upon what date that complaint was dismissed?

A. I do not. I would have to get the record book.

Mr. Simmons: Will you stipulate as to the date it was?

Mr. Sheldon: I guess so; I do not know what day it was.

Mr. Simmons: It was the same day you filed the second degree murder charge.

It is stipulated that the complaint was dismissed on October 12, 1949.

455 Q. Now, Judge, what is the situation, where is your office located?

A. On the second floor of the court house.

456 Q. In Gering, Nebraska?

A. Yes.

457 Q. And that is where the court room of the county court is located?

A. Yes.

458 Q. Do you know where the county jail of Scotts Bluff is located?

A. Yes.

459 Q. Where is it located?

[fol. 93] A. It is on the third floor directly—I presume directly above my office—part of it, at least.

460 Q. Now, between October — or between September 24th and October 12th were you ever absent from your office during ordinary business hours?

A. I wouldn't know for sure.

461 Q. Well, were you present most of the time during ordinary business hours?

A. Yes—between September 12th and what date?

462 Q. September 24th and October.

A. That was before the Bar Association meeting?

463 Q. Yes.

A. Yes; I was there most of the time.

464 Q. Was there any time you were absent more than a few hours?

A. I don't think I was ever absent a whole day.

Mr. Simmons: Your Honor, before the original question is put to this witness I would like to call other witnesses to prove the voluntary character of the statements made by the defendant.

Mr. Sheldon: Well, if the Court please, if Mr. Simmons proposes to do that it probably will be more desirable and expedient for us to use our other foundational witnesses. As I understand it, he proposes to introduce testimony going to the lack of voluntariness on the part of the [fol. 94] defendant in making this plea. We have further witnesses who will testify as to the voluntary character, and I suppose from the standpoint of convenience it would be more desirable if we were to put in all of that evidence which we have before Mr. Simmons does.

The Court: You mean withdraw the witness?

Mr. Sheldon: And, of course, then ask the question later on.

The Court: You may do that.

Would you stand down then, Judge Feidler?

(Witness Excused Temporarily.)

HON. TED R. FEIDLER, resumed the stand and, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Sheldon:

465 Q. I believe in one of my original questions to you, Judge Feidler, I asked you whether or not the arraignment of the defendant in your court occurred on the 12th day of October. Now, from an examination of the official court file, which you have just been examining, is it not true that in actuality the 12th of October was the date upon which [fol. 95] the complaint was filed, and the 13th of October was the date of arraignment in your Court?

Mr. Simmons: I am willing to stipulate that.

A. Yes, that is what the record shows.

STIPULATION

Mr. Sheldon: Will you stipulate on the admission of the complaint? If not I would like to offer it in evidence.

Mr. Simmons: Yes.

Mr. Sheldon: Will you mark that?

(Whereupon a Complaint was marked as Plaintiff's Exhibit No. 7 by reporter for identification.)

Mr. Sheldon: It is stipulated by and between the State of Nebraska and the defendant, Agapita Gallegos that a certain instrument which has been identified as Plaintiff's Exhibit No. 7 is the original complaint as filed herein in the County Court on the 12th day of October, 1949, which the state offers in evidence and requests leave to substitute a copy in lieu thereof.

Mr. Simmons: No objection.

The Court: It will be received.

(Which said Plaintiff's Exhibit No. 7, so offered and received in evidence, a copy of same may be found on next page hereof.)

(Witness Excused.)

[fol. 96] PLAINTIFF'S EXHIBIT No. 7

(Copy)

IN THE COUNTY COURT OF SCOTTS BLUFF COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff,

vs.

AGAPITA GALLEGOS, Defendant

STATE OF NEBRASKA,
County of Scotts Bluff, ss:

COMPLAINT—Filed October 12th, 1949. Ted R. Feidler, County Judge, by Georgene Shrader, Clerk of County Court

The Complaint and Information of Chauncey C. Sheldon, County Attorney of the County of Scotts Bluff, Nebraska, made in the name of the State of Nebraska, before me, the undersigned, Ted R. Feidler, County Judge within and for said County, this 12th day of October, A.D., 1949, who being duly sworn, on oath says that Agapita Gallegos defendant, on or about the 1st day of October, 1948, in the County of Scotts Bluff and the State of Nebraska, then and there being, did then and there, wilfully and unlawfully, maliciously, feloniously, and purposely, but without premeditation and deliberation strike, beat and wound one Genovesa Carrillo with a certain blunt instrument, and as a result thereof she died on or about the 1st day of October, 1948; defendant thus committed murder in the second degree, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the People of the State of Nebraska.

Chauncey C. Sheldon.

Subscribed and sworn to before me this 12th day of October, 1949.

Ted R. Feidler, County Judge, by Georgene Shrader, Clerk of the County Court. (Seal.)

[fols. 97-98] Mr. J. W. Lopez, called as a witness on behalf of the State and after being duly sworn, testified as follows:

Direct examination.

* * * * * * *

[fol. 99] 480 Q. Now, were you present in the County Court of Scotts Bluff County, Nebraska, on the 13th day of October of this year at the arraignment of the defendant in this case?

A. I was.

481 Q. Do you recall who else was present at that time?

A. Well, Mr. Morgan and Mr. Warrick was there, and Mr. Sheldon and Mr. Cluck, and I believe that is all that I remember.

482 Q. I don't know as I understand you correctly, you mentioned my name and then you mentioned Mr. Cluck's; I was not present at that time, was I?

A. No. Mr. Cluck was there.

483 Q. And, of course, the County Judge was there?

A. Yes.

484 Q. And do you recall whether or not the County Judge's secretary or clerk was there?

A. I don't know if the County Judge's secretary was there, but Miss Hauck—is that her name? The Sheriff's secretary? She was there.

485 Q. And the defendant, of course, was there, was he not?

[fol. 100] A. Yes, Mr. Gallegos was there.

487 Q. What was the first thing which was done when you went into the court room at the time and place you referred to, Mr. Lopez?

A. Well, we all walked in there and I was sworn in by Mr. Feidler to act as Interpreter for Mr. Gallegos.

Mr. Simmons: Just a minute now. May I question the witness as to the meaning of that statement when he said, "For Mr. Gallegos"?

By Mr. Simmons:

488 Q. You did not mean to say you were employed by Mr. Gallegos?

[fol. 101] A. No. No. I meant to interpret.

By Mr. Simmons:

489 Q. What he said?
A. What he said, yes.

The Court: Let the record show at no time in the proceedings in the County Court was Mr. Lopez at any time acting for and on behalf and at the instance of the defendant. That should cover it.

490 (Mr. Sheldon continuing:) Did someone read a complaint while you were in there, Mr. Lopez?

A. Yes. Mr. Cluck read the complaint, and after he had finished reading it he handed it to me and asked me to read it to Mr. Gallegos, and I did, in Spanish.

491 Q. Did you read the complaint in Spanish exactly as it was on the form which Mr. Cluck had handed you?

A. As near as I possibly could, yes, sir.

492 Q. You did not omit reading any portion at all, did you?

A. No, sir. No.

493 Q. Then what did you do?

Mr. Simmons: I object to that as no foundation laid and ask leave to cross examine the witness.

The Court: You may.

[fol. 102] Cross examination.

By Mr. Simmons:

494 Q. Mr. Lopez, when did you first see this witness?

The Court: Witness?

Mr. Simmons: I mean Mr. Gallegos.

A. The 1st day of October, sir. October 1st.

495 Q. Where was that?

A. In the County Sheriff's office.

496 Q. At that time he was in custody?

A. Yes, sir.

497 Q. Who had him in charge?

A. Well, he was just sitting in the Sheriff's office there. Mr. Morgan was there and Mr. Steve Warrick was there.

498 Q. And what is the fact as to whether or not Mr. Morgan or Mr. Warrick understand Mexican or Spanish?

Mr. Sheldon: Objected to as no foundation laid and immaterial.

The Court: Sustained.

499 Q. Do you know whether or not Mr. Warrick or Mr. Morgan understand Mexican?

Mr. Sheldon: Objected to as immaterial.

The Court: I cannot see the materiality of it.

500 Q Do you know whether or not Mr. Gallegos understands any English?

[fol. 103] A. Well, I couldn't say truthfully that he didn't understand, but he didn't act like he did.

501 Q. As far as you know, he didn't understand any English?

A. That is right, as far as I know he didn't understand it.

502 Q. At that time you carried on conversations or interpreted for—interpreted what was said between the Sheriff's officers and the defendant?

A. Yes, sir.

503 Q. How did you happen to be present in the office?

A. Mr. Morgan called me over the telephone at my house.

504 Q. And you were employed by the Sheriff's office, were you?

A. Yes, sir.

505 Q You have been employed by him before?

A. Yes, sir.

506 Q. And in response to that telephone call you came to the office, is that correct?

A. Yes.

507 Q. Was Mr. Gallegos represented by any attorney at that time?

A. No. No.

508 Q. You talked with him on that occasion?

A. Yes, I talked to him.

509 Q. For about how long?

A. Oh, possibly five or ten minutes.

[fol. 104] 510 Q. Did you ever talk to him again on any other occasion?

A. Oh, I have talked to him every time I have seen him.

[fol. 105] 513 Q. We are talking about the County Court, Mr. Lopez, and October 13th.

[fol. 106] A. Well, after Mr. Clack had read the complaint he handed it to Mr. Feidler and Mr. Feidler asked him if

he understood just what Mr. Cluck had read and Mr. Gallegos said, "I don't quite understand."

Mr. Simmons: I move to strike the part about the statement of the defendant. The question didn't call for any statements of the defendant.

Mr. Sheldon: We are trying to show that he talked to the defendant about it—about what the meaning of it was.

The Court: Well, proceed.

A. Oh, then he asked me, he says, "Will you take this complaint and read it in Spanish to Mr. Gallegos so that he understands it?" And at that time is when I read the full complaint to him—to Mr. Gallegos, and I ask him if he understands what I had read, and he said, "I understand."

Mr. Simmons: I object to anything that Mr. Gallegos said for the reason that there is no foundation laid.

Mr. Sheldon: Well, that is certainly a foundational matter, whether the defendant, himself, said that he understood what the interpreter said to him or read to him.

[fol. 107] The Court: He may answer that.

The Witness: What was the question?

(Question read by the reporter and answer.)

514 Q. Did he ask you any further questions?

A. Well, I asked him, "Is there anything you want to know about this?" And he said—(Interrupted.)

Mr. Simmons: I object to whatever the defendant said as there is no foundation here showing the voluntary character, and I will ask leave to cross-examine the witness.

The Court: You may.

Cross examination:

By Mr. Simmons:

515 Q. Now, Mr. Lopez, you talked to Mr. Gallegos the first time on October 1, 1949?

A. Yes, sir.

516 Q. In the Sheriff's office?

A. That's right.

517 Q. And at that time Mr. Morgan, the Sheriff, was present, and Deputy Sheriff Warrick was present?

A. Yes, and his stenographer—Mr. Morgan's stenographer.

518 Q. Do you know her name?

A. Mrs. Hauck.

519 Q. You talked to Mr. Gallegos at that time?

[fol. 108] A. Yes.

520 Q. All right. Did you ever talk to him at any other time?

A. You mean prior to this date?

521 Q. Did you ever talk to him prior to that date?

A. No, I hadn't seen him.

522 Q. Then after that date?

A. Yes, I talked to him.

523 Q. Then when was the next time?

A. I believe that was on a Saturday, and I think I talked to Mr. Gallegos that following—well, I don't know just exactly what day it was, but it was about a week I came back and read that statement that he made over to Mr. Gallegos.

524 Q. A week later, you think?

A. Well, I would say it was about a week.

525 Q. All right. Then how long did you talk to him at that time?

A. Oh, he and I were in there about an hour and a half—possibly two hours.

526 Q. How long were you talking to him the first time?

A. Oh, I'd say about three hours.

527 Q. Now, at either one of those times was he represented by counsel?

A. No.

528 Q. Was there anyone else present who understood his language?

A. Not to my knowledge there wasn't.

529 Q. Who was present the second time?

[fol. 109] A. Just Mr. Gallegos and I.

530 Q. The Sheriff's officers weren't present?

A. Well, the door was opened, but they weren't in the same room.

531 Q. They were there all of the time?

A. Yes, they were there all of the time.

532 Q. Who was there?

A. Well, they kept coming in and out; Mr. Morgan was in there sitting in his chair behind a desk, and Mr. Warrick would come into the office there, in and out.

533 Q. Did you ever talk to him at a later date?

A. Yes, I talked to him when he went in front of Judge Feidler.

534 Q. All right. You only talked to him those two times before he was brought into County Court?

A. That is right.

535 Q. No other time were you ever with him?

A. Not to my knowledge.

536 Q. Just to be sure, the first time you talked to him was on October 1st?

A. Yes.

537 Q. The second time was about a week later?

A. Well, something like that.

538 Q. And you didn't talk to him between that time and the date of the arraignment in County Court?

[fols. 110-113] A. No, I don't believe I did.

539 Q. Now, when he was arraigned in County Court was there anyone else present there who understood his language?

A. Not to my knowledge.

540 Q. Does the record show who was present in County Court? He wasn't represented by counsel in County Court either?

A. No, sir.

541 Q. Now, are you trained in law?

A. No.

542 Q. Have you had any training whatsoever in law?

A. No.

* * * * * * * *

[fol. 114] 551 Q. Mr. Lopez, every time you have ever talked to this man he was under custody, or was in custody?

[fols. 115-116] A. Well, the only times I ever talked to him he was in the Sheriff's office or in the hallway there, and that is——

(Interrupted.)

* * * * * * * *

[fols. 117-118] Direct examination.

Continued by Mr. Sheldon:

558 Q. Now, Mr. Lopez, did the defendant at any time when you had conversations with him, particularly with reference to the conversation which you had with him on the

occasion of his arraignment in the County Court, did he ever ask to consult with anyone?

A. No.

559 Q. And at the time of the arraignment did you in any manner advise the defendant how he should plead?

Mr. Simmons: Just a minute. I object to that as incompetent, irrelevant and immaterial. I would like to cross-examine further.

The Court: He may answer.

The Witness: May I answer?

Mr. Sheldon: You may answer.

A. No.

. . . . . .

[fols. 119-121] 563 Q. The defendant was in custody at the time of the arraignment, was he not?

A. Yes, I presume so.

564 Q. The sheriff's officers were present in the court room?

A. Yes, sir.

Mr. Simmons: I would like to call Mr. Morgan for further examination with reference to the voluntary character of the statement.

The Court: The request is denied.

Do you maintain that the mere presence of a police officer or law enforcement officer in a court room where a preliminary hearing is taking place of itself is coercion?

Mr. Simmons: Under the circumstances of this case I believe it is coercion. I want to show the circumstances.

STIPULATION

Mr. Sheldon: We will stipulate that this defendant is and has been all the time he was present in this county in the custody of the Sheriff's office.

. . . . . .

[fol. 122] Mr. Mahlon C. Morgan, recalled as a witness, having previously called and sworn, testified further as follows:

Direct examination.

By Mr. Simmons:

567 Q. For the sake of the record, you are the Sheriff of Scotts Bluff County?

A. I am.

568 Q. Now, you as Sheriff of Scotts Bluff County proceeded at sometime to El Paso, Texas, is that correct?

A. I did.

569 Q. At that time in El Paso, Texas, you took into custody Mr. Gallegos, the defendant in this case?

A. I did.

570 Q. Will you tell us on what day you took this man into custody?

A. I can tell you about what day; it was about the 27th of September.

571 Q. Now, what did you do after taking this man into custody?

A. You mean after I arrived here?

572 Q. After you arrived in El Paso?

A. We got on a bus and came home.

573 Q. Now, at any time that you were present with the defendant in El Paso was he taken before a magistrate?

[fol. 123] A. No.

* * * * * * *

[fol. 124] 578 Q. The Sheriff of El Paso County delivered him to you?

A. That is right.

579 Q. And you brought him to Scotts Bluff County?

A. That's right.

580 Q. Now, at the time that he was in Scotts Bluff County, what day did he arrive here, do you recall?

A. I left there one day and came in the next. If I left there the 27th I would be here the 28th.

581 Q. And he has been in your custody in Scotts Bluff County since September 28th?

A. Yes, sir.

582 Q. And been in your custody at all times in the court house—in the jail in the court house?

A. Except during the times that he was down on this floor.

583 Q. While he was in court?

A. Either in court or in the Sheriff's office.

584 Q. He has always been in the court house?

A. He has never been—no, he has been in custody all of the time. He hasn't been in the court-house all of the time.

585 Q. Was he ever brought before any other magistrate than Ted R. Feidler, County Judge?

A. No, except when he appeared in this room.

[fols. 125-133] 586 Q. Except Judge Perry in this court room?

A. That's right.

. . . . . .

[fols. 134-135] STIPULATION

Mr. Sheldon: I am perfectly willing to stipulate to the period of time the defendant was in custody—no attempt to conceal that in any way.

Mr. Simmons: I will stipulate the period of time he was in custody.

It is stipulated and agreed by and between the parties that the defendant was arrested in El Paso County, Texas, on the 19th day of September, 1949, and was held in custody by the Sheriff's office of El Paso, Texas, until released to the Sheriff of Scotts Bluff County, Nebraska.

Mr. Sheldon: On September 27th, according to Mr. Morgan.

Mr. Simmons: I think the record shows that. On September 27, 1949.

Mr. Sheldon: And has at all times since been in the custody of the Sheriff of Scotts Bluff County, Nebraska.

Mr. Simmons: The record shows that.

[fol. 136] Mr. Bob Bailey, called as a witness on behalf of defendant and after being duly sworn, testified as follows:

Direct examination.

By Mr. Simmons:

616 Q. Mr. Bailey, where is your home?
A. El Paso, Texas.
617 Q. What is your position?
A. Chief Deputy.
618 Q. Of El Paso County, Texas?
A. Yes, sir.
619 Q. Do you recognize the defendant?
A. Yes, sir.
620 Q. Are you the man that arrested him?
A. Yes, sir.
621 Q. Originally?
A. Yes, sir.
622 Q. On what day?
A. That was on Monday, I believe, the 18th of September.
623 Q. 1949?
A. Yes, sir.
624 Q. We don't have Chief Deputies in this state, what duties are the duties of a Chief Deputy?
[fols. 137-194] A. He is the Under-Sheriff. He is really under the Sheriff.
625 Q. Could you say as Chief Deputy anyone who is in the custody of the Sheriff's office is in your custody?
A. In the absence of the Sheriff I act as Sheriff.
626 Q. Now, was this man in your custody, or the custody of the Sheriff's office, from September 18th until turned over to the Sheriff of Scotts Bluff County, Nebraska?
A. Yes, sir.
627 Q. At all times he was kept in El Paso County?
A. Yes, sir.
628 Q. Now, are you personally acquainted with the details of his custody?
A. Well, he was confined to county jail.
629 Q. All during the entire time?
A. Yes, sir.
630 Q. During the period of his confinement was he ever charged with any offense—— (Interrupted.)
A. He was charged—— (Interrupted.)

Mr. Sheldon: Wait a minute please. We object—— (Interrupted.)

Mr. Simmons: I didn't finish my question.

631 Q. (Concluding last question:) —in any court in El Paso County?

A. No, sir.

[fol. 195] (Hearing continued in the presence of jury.)

MR. J. W. LOPEZ, recalled as a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct examination.

By Mr. Sheldon:

817 Q. Your name is J. W. Lopez?

A. Yes, sir.

818 Q. And you have been previously sworn as a witness and testified in this case, have you not?

A. I have.

819 Q. Mr. Lopez, were you present in the County Court of Scotts Bluff County, Nebraska, on the 13th day of October of this year, at which time the defendant, Gallegos, was arraigned upon the complaint filed against him in that Court?

Mr. Simmons: Just a minute now, I object to any questioning concerning such arraignment for the reason that there is no evidence whatsoever that the person named in the complaint herein is deceased or that there is any evidence whatsoever that any crime has been committed.

The Court: Overruled.

[fol. 196] 820 Q. You may answer.

A. I was.

821 Q. And was the County Judge present at that time?

A. Yes, sir.

822 Q. And the defendant was present at that time?

A. Yes, sir.

823 Q. Was Mr. Cluck, the Deputy County Attorney, present at that time?

A. Yes, sir.

824 Q. And was Mr. Hedge, the Deputy Sheriff of Scotts Bluff County present at that time?

A. I don't know as to whether he was there or not; I don't recall.

825 Q. Well, was there some representative from the Sheriff's office present?

A. Yes.

826 Q. What did you observe to be done at that time in the County Court, Mr. Lopez?

A. Well, Mr. Cluck got up—raised from his chair, rather, and read the complaint in front of Judge Feidler, and Mr. Gallegos and I, we were standing up.

827 Q. Then what did Mr. Cluck do with the copy of the complaint from which he had read, if you know?

A. Well, he handed it to Mr. Feidler, and Mr. Feidler then [fol. 197] handed it to me and asked me to read it in Spanish to Mr. Gallegos.

* * * * * * *

[fol. 198] 842 Q. Now then, going back to the point of the arraignment in County Court on the 13th day of October at the time when the County Judge handed you the complaint and asked you to read to it the defendant, will you state [fols. 199-200] to the jury what you did at that time?

A. Well, I read the complaint through and as I finished it I started to hand it back to Judge Feidler, and he asked me then, "Does he understand what you have just read to him?" So then in Spanish I asked him if he did, and he shook his head and said he didn't quite understand, and so Judge Feidler——

Mr. Simmons: I move to strike that as not responsive.

843 Q. What did you do then?

A. I asked the part that he didn't understand, and I explained it to him, or broke it down so that he could understand it.

* * * * * * *

[fol. 201] 853 Q. After you had concluded making the explanation, which you have just testified to, did you again ask him whether or not he understood the complaint?

A. I did, yes, sir.

854 Q. What did he reply?

Mr. Simmons: Objected to as calling for a conclusion of the witness and no foundation laid. The record in this case conclusively shows that the time the witness was asked to plea he did not understand the nature of the plea; the

evidence conclusively shows that words were not properly translated in the information to the defendant; the record does not show that the defendant was not being subjected at the time of his arraignment in the County Court of [fol. 202] coercive influence resulting from his illegal detention from at least September 28, 1949; for the further reason that the information does not state the crime of second degree murder, and the words contained in the information do not even in the English language convey to anyone the thought that the element of the crime of second degree murder requires intent to kill, but that the words used in the information only imply intent to strike; and for the further reason that the evidence does not show that the defendant was advised of his constitutional rights; that he was advised that he had a right to stand mute, nor is it shown that he understood the nature of the offense with which he is charged; for the further reason that the same was an improper plea, to-wit: That the laws of the State of Nebraska require that the Judge on an arraignment shall accept only the pleas of "Guilty" or "Not guilty", but that if the defendant or person being arraigned, evasively or otherwise, stands mute, that the Judge shall enter a plea of "Not guilty," and that the record in this case conclusively shows that the defendant did not reply to the information "Guilty", and for the further reason [fol. 203] that the state has not shown that the information was properly translated to the defendant; that he understood the nature of the offense; that the same was taken under circumstances showing an entire absence of any coercive influences, and for the further reason that the evidence conclusively shows that the County Judge of Scotts Bluff County, Nebraska, directed the witness to explain to the defendant the meaning of the charge; that the witness was unqualified and incompetent and under no authority of any Court whatsoever to explain anything to any person, but merely his duty was a mechanical duty of translating Spanish words into English, and English words into Spanish, and that he was, therefore, violating his duties; that the record does not show that the witness was properly sworn as an Interpreter; that the record shows that the County Judge directed the witness to explain the charge to the defendant and thereby directed the witness to obtain a plea from the defendant, being a coercive factor since he has a right to stand mute and not plea; and for

the further reason that the State of Nebraska has not shown that the plea was taken in compliance with the laws [fols. 204-207] of the State of Nebraska, the Constitution of the State of Nebraska or with the Constitution of the United States, or that the plea was made under due process of law.

The Court: It will be overruled.

Mr. Sheldon: You may answer, if you remember the question.

The Witness: I don't remember.

(Whereupon the last two questions were read by the Court Reporter.)

A. He said that he understood.

855 Q. And did you ask the defendant if he desired to enter a plea to the complaint?

Mr. Simmons: Yes or no.

A. Yes.

856 Q. What did he say?

Mr. Simmons: Just a minute now. May the record show the same objection that I made previously without repeating it at this time.

The Court: Overruled.

Mr. Sheldon: You may answer.

A. He said, "Guilty."

* * * * * * * *

[fols. 208-245] Cross-examination.

By Mr. Simmons:

875 Q. Mr. Lopez, what is the fact as to whether or not Mr. Gallegos was represented by counsel on October 13, 1949?

Mr. Sheldon: To which the state objects for the reason that there is no foundation laid and immaterial.

The Court: He may answer.

A. You mean someone with him there?

876 Q. Yes.

A. There was no one—no counsellor there.

877 Q. Was he represented by an attorney?
A. No. No.

. . . . . .

[fol. 246] Hon. TED R. FEIDLER, recalled as a witness on behalf of the plaintiff and after being duly sworn testified as follows:

Direct examination.

By Mr. Sheldon:

1068 Q. Your name is Ted R. Feidler?
A. Yes, sir.
1069 Q. You are the County Judge of Scotts Bluff County, Nebraska?
A. I am.
1070 Q. You are the same Judge Feidler who appeared as a witness during the morning session of Court?
A. That's correct.
1071 Q. Judge Feidler, on the 13th day of October of this year were you acting as County Judge of Scotts Bluff County, Nebraska?
A. I was.
1072 Q. And on that day did you preside in the County Court at the arraignment of the defendant here in your court on a complaint filed against him by the State of Nebraska?
A. I think that was the date.
1073 Q. Handing you what has been received in evidence as Plaintiff's Exhibit No. 7, purporting to be the complaint to which I have referred, are you able to tell from an examination of that Exhibit whether or not the 13th of October was the date upon which the defendant was arraigned in your court?
A. That is the correct date.
[fol. 247] 1074 Q. Now, the defendant was present on that occasion, was he not?
A. He was.
1075 Q. And was Mr. Cluck, Deputy County Attorney of Scotts Bluff County, present?
A. He was.
1076 Q. And was a representative of the Sheriff's office of Scotts Bluff County present?

A. The office girl was there.

1077 Q. But was there also a representative of the Sheriff's office.

A. There was someone walked in with the defendant; I don't remember which one of the officers it was.

1078 Q. Was Mr. J. W. Lopez, also, present?

A. He was.

1079 Q. Will you state to the jury just what occurred on that occasion?

A. The defendant was arraigned before the Court. First, I had Mr. Lopez raise his right hand and swore him in as an Interpreter, and then Mr. Cluck rose and read the complaint to the defendant from a copy which he had in his hand, and after he had completed reading it he handed it to Mr. Lopez who in turn purported to read it to the defendant—that is, in some foreign tongue he carefully went over the complaint. After he had done that I asked Mr. Lopez to ask the defendant if he knew what the complaint charged. Mr. Lopez had some little conversation in this foreign language with the [fols. 248-249] defendant and then he turned to me and he said, "He does not quite understand." And I said, "Will you explain it to him further?" And then there was some further conversation between the defendant and Mr. Lopez and Mr. Lopez said, "He now understands."

Mr. Simmons: Can we break his answer off at that point, Your Honor?

The Court: You may.

1080 Q. And did you request Mr. Lopez to inquire of the defendant how he wished to plea to the complaint filed against him?

Mr. Simmons: That is yes or no.

A. I believe—yes, but it was subject to some qualification.

1081 Q. Well, let me put it this way: Did Mr. Lopez state in open court in your presence what the defendant desire to plead?

A. He did.

1082 Q. What did he state?

* * * * * * *

[fol. 250] 1083 Q. You may answer the question, Judge Feidler, or would you care to have it read to you?

A. What was the last question?

(Question read by the reporter.)

A. He said that the defendant plead guilty.

1084 Q. Now, Judge Feidler, during the time that the arraignment was being held in your Court in the manner to which you have just testified, did you ever see anyone or hear anyone make any threats, promises or inducements to the defendant or make any intimidating gestures towards [fols. 251-253] the defendant?

A. I did not.

[fols. 254-278] 1099 Q. Judge Feidler, where is your office located?

A. It is on the second floor of the court house, Gering, Nebraska.

1100 Q. In the same building we are in now?

A. Yes.

1101 Q. Do you know where the jail of Scotts Bluff County is located?

A. It is on the third floor.

1102 Q. Where is that in reference to your office?

A. It is directly above my office.

1103 Q. Now, will you advise the jury as to whether or not you were in your office between September 24, 1949, and October 12, 1949?

A. I believe I was there most of the time.

[fol. 279] Mr. Bob Bailey, recalled as a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct examination.

By Mr. Sheldon:

1177 Q. Your name is Bob Bailey?

A. Yes, sir.

1178 Q. You are the same Bob Bailey who has previously appeared as a witness in this case, are you not?

A. Yes, sir.

Mr. Simmons: Does the record show this is being taken in the absence of the jury?

Court Reporter: Yes.

Mr. Sheldon: Although it may be a little repetitious, I believe I will lay the foundation again.

The Court: Very well.

1179 Q. What is your business or occupation, Mr. Bailey?

[fol. 280] A. I am a deputy sheriff.

1180 Q. Where?

A. In El Paso County, Texas.

1181 Q. Do you have any other designation than Deputy?

A. I am Chief Deputy.

1182 Q. What does that involve?

A. Well, I am directly under the Sheriff; in his absence I act as Sheriff.

1183 Q. How long have you occupied the position of Chief Deputy of El Paso County?

A. Since July of this year.

1184 Q. Had you been a Deputy Sheriff prior to that time?

A. Yes, sir.

1185 Q. How long have you served as Deputy Sheriff?

A. Since 1935.

1186 Q. Have you been in any other law enforcement work before that?

A. No, sir.

1187 Q. You have seen the defendant Agapito Gallegos before, haven't you?

A. Yes, sir.

1188 Q. Where and when did you first see him?

A. I saw him the first time on the Wallcott farm at Ysleta, Texas.

1189 Q. Where is that?

[fol. 281] A. That is about fifteen miles southeast of El Paso.

1190 Q. Is that location in El Paso County?

A. In El Paso County, yes, sir.

1191 Q. What occasion did you have to see him then?

A. I went down and arrested Agapito and his brother.

1192 Q. I don't believe you stated approximately what date this was.

A. That was on the, I believe Monday, the 19th of September.

1193 Q. Then what did you do, Mr. Bailey?

A. When I arrested him? I took him into El Paso to the Sheriff's office.

1194 Q. Were you alone at that time?

A. Yes, sir.

1195 Q. How did you happen to arrest the defendant?

A. Well, a letter came in from the Immigration Service, the United States Immigration—Naturalization and Immigration Service, stating that—they brought the letter over to us, to the Sheriff's office—that a woman—a girl—that her mother came to Nebraska with Agapito.

Mr. Simmons: I object to the contents of the letter as hearsay and no. the best evidence.

The Court: Sustained.

1196 Q. It was a result of some information you got from the Immigration Department?

A. Yes, sir.

[fol. 282] 1197 Q. Then what took place after you returned to the jail with the defendant?

A. When I put him in jail?

1198 Q. Yes.

A. Well, I did go up and talk to him and asked him if his name was Agapito and he said it wasn't; his name was Francisco.

1199 Q. When and where did you ask him that?

A. In the Sheriff's office.

Mr. Simmons: Just a minute now. Does the record show that he can speak his lang. ge. I don't remember.

The Court: Yes. He said he did. I think you were asked that question before, whether you spoke and understood the Spanish language.

The Witness: No, sir, I was not.

Mr. Sheldon: Not today, but yesterday you were asked by Mr. Simmons.

The Witness: Yes.

Mr. Sheldon: We will lay further foundation.

1200 Q. Was that on the same day that you arrested him that you asked him what his name was?

A. Yes, sir.

1201 Q. And he said it was Francisco?

[fol. 283] A. Yes, sir.

1202 Q. Did you ask him specifically whether or not it was Agapito?

A. I asked him for Agapito Gallegos, and he said, "I am Francisco." And I asked him if he knew Agapito and he said he didn't, no.

Mr. Simmons: I object to any statement made by the defendant until it is shown that the same is voluntary.

Mr. Sheldon: We can lay some foundation on that if you are going to insist on it at this time.

1203 Q. How did you take the defendant from the farm where you arrested him, Mr. Bailey?

A. By automobile.

1204 Q. Was there anyone in the automobile in addition to yourself, and the defendant?

A. His brother, Antonio.

1205 Q. Where did you first go when you arrived at the court house?

A. Into the Sheriff's office.

1206 Q. It was there that you had the conversation with him about his name?

A. Yes, sir.

1207 Q. Who was present in the Sheriff's office in addition to yourself and the defendant and his brother?

A. There was several of the deputies.

[fol. 284] 1208 Q. You don't recall presently who they were?

A. Yes, sir. It was Frank Manning, Bill Lanston and Rubio Villeral.

1209 Q. Now at that time, Mr. Bailey, did you or any one else make any threats, promises or inducements to the defendant or did you make any intimidating gestures toward the defendant?

A. No, sir.

Mr. Simmons: Just a minute. I move to strike that and object to the question as calling for a conclusion of the witness and no foundation shown.

The Court: Overruled.

Mr. Sheldon: Do you have the answer, Mr. Reporter?

Court Reporter: Yes, I do have.

1210 Q. Did you again have occasion to talk with the defendant after that time?

A. Yes, sir. I talked to him every day.

1211 Q. That was on Monday that you arrested him?

A. Yes, sir.

1212 Q. And you talked with him again on Tuesday?

A. On Tuesday.

1213 Q. Where was that conversation?

A. I talked to him—we have visiting chapels and I would take him to a visiting chapel and we would sit there and talk.

[fol. 285] 1214 Q. Where is the visiting chapel with respect to the jail? Is it actually in the jail?

A. Well, yes, sir; it is on the same floor, but it is not in the jail. It is a hallway off of the jail.

1215 Q. Does it have any outside windows in it?

A. Yes, sir.

1216 Q. Do you have any place to sit down?

A. Yes, sir.

1217 Q. Do you recall whether or not the door into the visiting room was opened or closed?

A. It was opened.

1218 Q. Were people walking back and forth?

A. Yes, sir.

* * * * * * *

[fol. 286] 1225 Q. All right. Then going back to the next occasion when you talked with the defendant, that was on Tuesday, September 20th?

A. Yes, sir.

1226 Q. What was said and done at that time?

A. I was questioning him as to whether he was Agapito Gallegos and he maintained that he was Francisco Gallegos, and I talked to him Tuesday and he still—when I took him back to the jail, well he still maintained that he was Francisco Gallegos; that he didn't even know Agapito Gallegos.

1227 Q. Did you ever ask him whether or not he had ever been in Nebraska?

A. Yes, sir.

1228 Q. What did he say about that?

[fol. 287] A. He said he hadn't.

Mr. Simmons: I object to this testimony as to what the defendant said unless it is shown that the same is voluntary.

Mr. Sheldon: I thought we had laid the foundation for that.

The Court: Overruled.

Mr. Sheldon: You may answer, Mr. Bailey.

A. He said that he had never been to Nebraska.

1229 Q. Do you recall anything else in particular which was said on the occasion of this conversation?

A. He said that he never had heard of Agapito Gallegos and that he had never been to Nebraska.

Mr. Simmons: Does the record show who was present when this conversation took place?

Mr. Sheldon: I thought it did. However, if there is any doubt about it I will lay a little more foundation.

1230 Q. Did you state that there was no one present at this conversation except yourself and the defendant?

A. Just Agapito and I.

1231 Q. And at any time during the conversation or at any time prior to the conversation did you or anyone else make any threats, promises or inducements to the defendant?

[fol. 288] A. No, sir.

1232 Q. Or make any intimidating gestures toward him?

A. No, sir.

Mr. Simmons: I object to that as calling for a conclusion of the witness.

The Court: Overruled.

1233 Q. Your answer was "No"?

A. No, sir, we never.

1234 Q. When was the next occasion which you recall having talked to the defendant?

A. On a Thursday. I was—something happened Wednesday and I didn't get to go to talk to him on a Wednesday, and the next time was Thursday.

1235 Q. Where was that?

A. That was in a visiting chapel.

1236 Q. Were the conditions in the visiting chapel the same on Thursday as they had been on Tuesday?

A. Yes, sir.

Mr. Simmons: Objected to as calling for a conclusion of the witness.

Mr. Sheldon: I asked him what the conditions were.

The Court: Overruled.

1237 Q. Was there anyone present at that time beside [fol. 289] yourself and the defendant?

A. No, sir.

1238 Q. And did you at any time during the conversation on Thursday, or at any time prior to the conversation, or did anyone else, to your knowledge, make any threats, promises or inducements to the defendant or make any intimidating gestures toward him?

A. No, sir.

Mr. Simmons: Just a minute. I object to that as calling for a conclusion of the witness and no foundation.

The Court: Overruled.

1239 Q. What was said and done on the occasion of your conversation with him on Thursday?

A. I was just talking to him and I told him I would feel better if he told the truth and told me his real name, and then he told me his name was Agapito and that he had been in Nebraska.

Mr. Simmons: I would like to ask leave to cross-examine before he goes any further.

The Court: You may.

[fol. 290] Cross-examination.

By Mr. Simmons:

1240 Q. Mr. Bailey, during this conversation you were alone with the defendant?

A. Yes, sir.

1241 Q. You arrested the defendant personally?

A. Yes, sir.

1242 Q. And at that time also took into custody a person you described as his brother?

A. Yes, sir.

1243 Q. What is his name?

A. Antonio.

1244 Q. You brought them both back from where you found them to the court house at El Paso?

A. Yes, sir.

1245 Q. And did you talk to him at that time?

A. Yes, sir; I talked to both of them.

1246 Q. On the way in in the car?

A. Yes, sir.

1247 Q. When you got back to the court house you talked to both of them or did you talk to them separately?

A. I talked to them both together.

1248 Q. Now, you named several deputy sheriffs who were present, were you talking to the defendant alone or [fol. 291] with his brothers at that time?

A. We were in the back office and these deputies were in that office when I was talking to him.

1249 Q. Was Adolf Pedregan present at that time?

A. No, sir.

1250 Q. How long did you talk to him on that day—that is, Monday?

A. I talked to him after we got to the Sheriff's office I guess for an hour.

1251 Q. And then what happened?

A. After I got through talking to him?

1252 Q. Yes.

A. I placed him in jail.

1253 Q. What time of the day was this?

A. That was around two P. M. Two P. M.

1254 Q. Now, you say you placed him in jail. Did you have anything to do with his custody in jail?

A. Well, we have custody of the jail. It's under our supervision.

1255 Q. Well, did you personally have anything to do with his custody?

A. No, sir. We have a jail—we have jailers and a Captain of them.

1256 Q. How many deputy sheriffs are there in El Paso County?

A. Fifty.

1257 Q. Fifty?

[fol. 292] A. Yes, sir.

1258 Q. Not fifteen—fifty?

A. Fifty.

1259 Q. Some of those are jailers?

A. There are seven or eight of them are jailers.

1260 Q. Now, you as Chief Deputy, you just turned this defendant over to one of the jailers?

A. Took him upstairs on the fifth floor and booked him and turned him over to the jailer; that is what we do with all prisoners.

1261 Q. From then until the next day you don't know how he was kept or what happened to him in the jail?

A. No, sir, I don't.

1262 Q. Now, you took him out, or he was taken out of jail on Tuesday?

A. Yes, sir.

1263 Q. What time of the day was that?

A. Well, it was before noon. I don't know the exact time.

1264 Q. You don't remember the exact time?

A. No, sir.

1265 Q. You were alone with the defendant?

A. Yes, sir.

1266 Q. And how long did you talk to him at that time?

A. Well, I talked to him for about an hour.

[fol. 293] 1267 Q. At that time he still insisted that he had never been in Nebraska?

A. Yes, sir.

1268 Q. And then what happened to him, do you recall

A. I talked to him and then just took him back to the jail and turned him over to the jailer.

1269 Q. You gave him to the jailer before noon Tuesday?

A. Yes, sir.

1270 Q. And then the next time you talked to him was on Thursday sometime?

A. Thursday, yes, sir. I didn't talk to him on Wednesday.

1271 Q. What time on Thursday?

A. That was before noon; I don't remember the exact time. It was between nine and twelve.

1272 Q. And you were alone?

A. Yes, sir.

1273 Q. About how long did you talk to him on that occasion?

A. About an hour.

1274 Q. Now, between Tuesday before noon, when you turned the man over to the jailers, and Thursday morning sometime you did not see the man?

A. Between Tuesday and Thursday I didn't—after I turned him over to the jailer Tuesday and Thursday morning I didn't see him until Thursday morning.

[fol. 294] 1275 Q. You don't know—you just assumed that he was in custody, but you don't know any details of where he was?

A. Well, I know where he was.

1276 Q. Well, you turned him over to the jailer, is that correct?

A. Yes, sir.

1277 Q. You didn't see him again?

A. No. I saw him put him up.

1278 Q. Well, when did you see him put him up?

A. When I turned him over to the jailer I went back with the jailer to the cell block where they keep the prisoners. I went back with the jailer.

1279 Q. That is, up to the fifth floor, you mean?

A. Yes, sir; on the fifth floor.

1280 Q. And you turned him over to the jailer before noon?

A. Yes, sir.

1281 Q. And then you didn't see him again until Thursday morning?

A. Yes, sir.

1282 Q. Now, let's see, Thursday would be—Monday was the 19th. Is that the correct date, that is the day you arrested him?

A. Yes, sir.

1283 Q. And Tuesday would be the 20th, Wednesday

the 21st, and so Thursday would be the 22nd; is that correct?

A. That's right.

1284 Q. Now, where was the defendant's brother all of [fol. 295] this time, if you know?

A. He was in the county jail.

1285 Q. Did you ever talk to him?

A. Yes, sir.

1286 Q. When did you talk to him?

A. Well, I was trying——(Interrupted)

Mr. Sheldon: Just a minute, Mr. Bailey. We object to any inquiry regarding conversations with the brother for the reason that it is improper cross-examination, not within the scope of the direct examination and immaterial with respect to the subject regarding which this witness is being inquired.

The Court: Sustained.

1287 Q. Well, was the brother present at any of the conversations you had with Mr. Gallegos?

A. The first day on Monday, the day that they were arrested.

1288 Q. But at the other conversations you referred to he was not.

A. No, sir.

1289 Q. Now, what charge was placed against the defendant?

A. We picked him up for vagrancy and hold for immigration.

1290 Q. Was any charge filed in any court in El Paso County?

A. In the State Court?

1291 Q. In any court in El Paso County?

[fol. 296] A. I think they have a warrant for him, the Department of Justice, for being in the country illegally.

1292 Q. Was any complaint filed against him in any court in El Paso County up until Thursday, September 20th?

A. Well, I couldn't tell you about the Federal Court, but in the State Court I can. There was no charge filed against him in the State Courts.

1293 Q. Did you have a warrant authorizing his detention?

A. We house all Federal prisoners, immigration and others, and I wouldn't be able to say; they don't bring us their warrants—immigration warrants.

1294 Q. You don't know then?

A. I don't know. They just——(Interrupted)

1295 Q. As far as the state, was there any state charge?

A. No state charge. I can tell you about the state charge. There was no state charge placed against him, but there was a hold placed on him by the Immigration Service.

1296 Q. That is just a telephone——(Interrupted)

A. No; we have an Interpreter that comes into the jail every day.

1297 Q. Just asks you to hold them?

A. And interviews all persons that is in for a Federal Immigration charge.

1298 Q. Now, you had this man then in custody until when?

[fols. 297-314] A. From Monday the 19th of September and I believe the Sheriff from this county, Scotts Bluff County, came down on a Monday—on the following Monday.

1299 Q. Now, when the Sheriff of Scotts Bluff County, Nebraska, arrived, you turned the defendant over to him, is that correct?

A. Yes, sir.

1300 Q. And they left your county, so far as you know?

A. Yes, sir.

1301 Q. Now, at any time during that entire period was the defendant charged with any crime in any of the courts in El Paso County, to your knowledge?

The Court: Hasn't he answered that?

Mr. Sheldon: I believe he has.

Mr. Simmons: I believe he answered up to Thursday.

1302 Q. Was any charge ever filed against him?

A. Not in the state courts.

1303 Q. Now, at any time during the time he was in El Paso County was he ever taken before a magistrate?

A. No, sir.

* * * * * * * * *

[fol. 315] Cross-examination.

By Mr. Simmons:

1375 Q. He was not advised, however, that he had a right to demand legal counsel, was he?

The Court: He has already said that he was not.

1376 Q. Now, as I understand you, you say that on Thursday the defendant told you who he was and that he had been in Nebraska?

A. Yes, sir.

1377 Q. It was not until Friday that he made any admission concerning any crime, is that right?

[fol. 316] A. That is right.

1378 Q. At the time he made his first admission to you, you were alone with him in this visiting room?

A. Yes, sir.

1379 Q. And at that time after he had made the admission you left him momentarily to get the Sheriff and Mr. Pedregan?

A. I imagine for about an hour.

1380 Q. There was an hour's interval there?

A. Yes, sir.

1381 Q. Where was the defendant during that hour?

A. He was upstairs.

1382 Q. You took him back?

A. In the jailer's office.

1383 Q. What time of the day was this that you first talked to him?

A. It was around—it was Friday morning when I first talked to him, and I think it was around nine o'clock.

1384 Q. How long did you talk to him at that time?

A. Until about ten or ten-thirty.

1385 Q. Then you came back with Mr. Pedregan and the Sheriff about eleven-thirty?

A. Yes, sir.

1386 Q. Was that the first time that you had interviewed the defendant in the presence of Mr. Pedregan?

A. Yes, sir.

[fol. 317] 1387 Q. As far as you know, it was the first time he had seen him?

A. Yes, sir.

1388 Q. At that time you had told Mr. Pedregan the nature of the admissions that had been made by Mr. Gallegos?

A. Yes, sir.

1389 Q. And had this Exhibit No. 10 been prepared at that time?

A. Mr. Pedregan took this statement from him in my presence.

1390 Q. This exhibit had not been prepared at the time that Mr. Pedregan met the defendant?

A. No, it hadn't been prepared. No.

1391 Q. This statement, or this Exhibit No. 10, where was it typed?

A. In the Investigator's office.

1392 Q. Is that where you and Pedregan and Mr. Gallegos were at the time?

A. And the Sheriff, yes, sir.

1393 Q. And the Sheriff?

A. Yes, sir.

1394 Q. Now, during the time that the defendant was present in your jail in El Paso, did he cause any trouble of any kind?

A. No, sir.

1395 Q. He was quite a docile prisoner?

A. Yes, sir.

1396 Q. Of course, you could talk to him in his tongue?

A. Yes, sir.

[fols. 318-322] 1397 Q. He did everything that you asked him to do?

A. Yes, sir.

1398 Q. And as far as you knew, that anyone else asked him to do?

A. Yes, sir.

1399 Q. It wasn't necessary to restrain him in any way?

A. No, sir.

1400 Q. And he when he was finger printed—were you present when he was finger printed?

A. No.

* * * * * * *

[fol. 323] 1427 Q. Now, Mr. Bailey, when you took the defendant and his brother in to the jail from Ysleta, or wherever it was you arrested him, did you have a conversation with him on the way into jail?

A. Yes, I talked to him.

1428 Q. At that time you asked him who he was, I suppose?

A. I asked him who he was.

1429 Q. He told you—he gave you a name?

A. Yes.

1430 Q. The same last name?

A. He gave me the name of Francisco Gallegos.

1431 Q. That is the same last name?

[fol. 324] A. Surname, yes.

1432 Q. Just a different first name?

A. Yes.

1433 Q. At that time what did you tell him you were going to do?

A. I was going to take him up to the court house and talk to him.

1434 Q. Did you ever tell him that he would be turned over to the Mexican authorities?

A. No, sir.

1435 Q. At any time?

A. Turned over to the Mexican authorities?

1436 Q. Yes.

A. No. I told him he would be turned over to the United States Immigration Service.

1437 Q. What did you tell him would happen to him there?

A. That they would deport him back to Mexico.

1438 Q. And that he would be turned over to the Mexican authorities?

A. They turn them over to the Mexican authorities when they transport them; they turn them over to the Mexican Immigration Service. United States Immigra-

tion Service takes them to Mexico and turns them over to the Mexican Immigration Service.

1439 Q. What I am asking you is what you told Mr. Gallegos. I understand the procedure, myself. Did you [fols. 325-326] tell him he would be turned over to the Mexican authorities?

A. I do not recall telling him he would be turned over to the Mexican authorities.

1440 Q. It is possible you did?

A. No, I don't know any reason why I would.

* * * * * * *

[fol. 327] Mr. A. M. Pedregan, recalled as a witness on behalf of the plaintiff, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Sheldon:

1448 Q. Your name is A. M. Pedregan?

A. Yes, sir.

1449 Q. You are the same A. M. Pedregan who has been previously sworn as a witness and testified in this case?

A. Yes, sir.

1450 Q. Now, Mr. Pedregan, you have seen the defendant before, have you not?

A. Yes, sir.

1451 Q. Where did you see him?

A. In El Paso.

1452 Q. When?

A. That wa. on September the 23rd.

1453 Q. And where did you see him in El Paso on that date?

A. I saw him in the Investigator s office.

1454 Q. Who was present at that time in addition to yourself and the defendant?

A. Sheriff Campbell, Chief Deputy Bailey and myself.

1455 Q. At that time did you have a conversation with both Mr. Bailey and the defendant with reference to the [fol. 328] subject of this prosecution?

A. Yes, sir.

1456 Q. And as an outgrowth of that conversation did you prepare a statement?

A. Yes, sir. I wrote the statement.

1457 Q. Handing you what has been identified as Plaintiff's Exhibit No. 10, I will ask you to examine that and state whether or not it is the statement to which you refer?

A. That is the same. That is the same statement.

1458 Q. Where was the statement prepared?

A. In the Investigator's office.

1459 Q. That is the same room in which you were talking with the defendant?

A. In the same room.

1460 Q. By whom was the actual typewriting performed?

A. By me.

1461 Q. Was that all done in the presence of the defendant?

A. Yes, sir.

1462 Q. What did you do immediately after you had finished typewriting the statement?

A. I read it to him in Spanish—interpreted the contents of the statement in Spanish, and I told him that——(Interrupted)

Mr. Simmons: Just slow up a little; he has to interpret it.

A. I read the statement to him in Spanish—interpreted [fol. 329] that in Spanish; and before we took the statement I told him that he wasn't compelled to do that if he wished; it must be a voluntary statement; that it might be used, and most likely would be used in the trial against him if he did.

1463 Q. Calling your attention to Plaintiff's Exhibit No. 10. You observe that part of the document is a printed form and the other portions of it have been filled in or supplied by typewriting?

A. Yes, sir.

1464 Q. Did you read the entire contents of the statement, including the printed matter?

A. Including the printed matter, yes.

1465 Q. And did you ask the defendant whether or not it was correct?

A. Yes, sir, I did.

1466 Q. What did he reply?

A. He said that it was.

Mr. Simmons: Just a minute. I object to that on the grounds there is no showing that the defendant was acting free and clear of all involuntary influences—or of coercive influences and that he was acting voluntarily at the time.

Mr. Sheldon: If the Court please, I think that foundation has already been laid by Mr. Bailey, however I will, also, lay it with Mr. Pedregan.

[fol. 330] The Court: Very well.

1467 Q. Mr. Pedregan, at any time during the proceedings relating to the giving of this statement, or at any other time, either before or after, to your knowledge, did you or any other person ever make any threats, promises or inducements to the defendant or make any intimidating gestures toward him?

Mr. Simmons: Just a minute now. I object to that as calling for a conclusion of the witness, no foundation laid and does not exclude all other coercive influences.

STIPULATION.

The Court: It is stipulated and agreed by and between the plaintiff, the State of Nebraska, and the defendant, Agapito Gallegos, that at all times from on or about Monday, the 19th day of September, 1949, until this date that the defendant Agapito Gallegos has been in custody either of the authorities of El Paso County, Texas, or of the authorities of Scotts Bluff County, Nebraska, and that from on or about the 19th day of September, 1949, until on or about the 27th day of September, 1949, he was incarcerated in the county jail of El Paso County, Texas, and since his return to the State of Nebraska on or about Wednesday, the 28th day of September, 1949, until this [fol. 331] date has been in custody of the Sheriff of Scotts Bluff County, Nebraska, and incarcerated in the county jail of Scotts Bluff County, Nebraska.

Mr. Simmons: Now, may we stipulate a little further than that, Your Honor?

It is stipulated further that during the entire period referred to in the above stipulation until October 13, 1949, that the defendant was never brought before any magistrate in the State of Texas or the State of Nebraska.

Mr. Sheldon: I do not think it is material, but we are perfectly willing to stipulate to it.

The Court: It is so stipulated.

The objection of the defendant is overruled.

You may answer.

Read Mr. Pedregan the question.

(Question read by the Reporter.)

A. No, sir, not to my knowledge.

1468 Q. Did you personally observe the defendant sign Plaintiff's Exhibit No. 10?

A. Yes, sir.

[fol. 332] Cross-examination.

By Mr. Simmons:

1469 Q. Mr. Pedregan, when you said there were no threats made it was to your knowledge. When did you first see Mr. Gallegos?

A. It was that morning the day that I made the statement; I imagine it was around eleven o'clock in the morning.

1470 Q. And you were with him during the time that the exhibit was drawn up?

A. Yes, sir.

1471 Q. And how long did that take?

A. It probably took an hour or more.

1472 Q. And then you left his presence—you and Mr. Gallegos were separated someway?

[fols. 333-334] A. After it was signed, yes.

1473 Q. When was the next time after that that you saw him?

A. I didn't see him any more.

1474 Q. Until—— (Interrupted)

A. In El Paso County.

1475 Q. Until you arrived here in this court room?

A. Until I arrived here in this court room.

Mr. Simmons: I am through with Mr. Pedregan.
Mr. Shelden: That is all.
Witness excused.

. . . . . .

[fol. 335] Mr. Agapito Gallegos, the defendant, called as a witness in his own behalf, after being duly sworn, testified, through the interpreter, as follows:

Direct examination.

By Mr. Simmons:

1476 Q. You are Agapito Gallegos?
A. Yes, sir.
1477 Q. How old are you?
A. Thirty-eight.
1478 Q. Where were you born?
A. Valparaiso.
1479 Q. Where is Valparaiso?
A. In Zacatecas.
1480 Q. Is that your home?
A. In a farm near about Valparaiso.
1481 Q. Have you lived around Valparaiso most of your life?
A. Most all of the time in one farm alone.
1482 Q. How many brothers and sisters do you have?

By Interpreter: He wants to know if you want him to give the names?
Mr. Simmons: No. Just how many.

A. Four.
1483 Q. Do you have a brother named Francisco Gallegos?
A. No, sir.
[fol. 336] 1484 Q. Where did you go to school?
A. I have had no schooling.
1485 Q. Can you read?
A. No, I can not.
1486 Q. Do you have any children?
A. The family I have was left to me small because the

wife I had left me about five years ago. I don't know about her.

1487 Q. How many children do you have?

A. There are four.

1488 Q. How old are they?

A. The oldest one is growing on twenty; the other one is growing on fourteen, and one growing on eleven and one six.

1489 Q. Where are your children now?

A. They are with my father, one that is married and one that is with my wife—with the Mrs.

1490 Q. Are they in the United States?

A. No, sir, they are in Mexico.

1491 Q. Now, Mr. Gallegos, were you ever arrested in El Paso County, Texas?

A. Yes, sir.

1492 Q. Where were you when you were arrested?

A. On a farm working.

1493 Q. Who arrested you?

A. This sheriff that is here.

[fol. 337] 1494 Q. Is that Mr. Bailey?

A. Yes, Senior Bailey—Mr. Bailey.

1495 Q. Were you alone when you were arrested?

A. Me and my brother were working in the field.

1496 Q. Was your brother also arrested?

A. Yes, sir.

1497 Q. What is your brother's name?

A. Antonio Gallegos.

1498 Q. When you were arrested did the officer arresting you tell you why you were being arrested?

A. He didn't tell me for why; he just was looking for my name.

1499 Q. Now, when the sheriff who arrested you was taking you and your brother in his car into town did he tell you what he was going to do with you? Yes yes or no.

A. He told me he was going to keep me locked up until I told him the truth.

1500 Q. Did he tell you he was going to turn you over to anyone?

A. That there was nothing said, there was no treatment of that kind. He just wanted to know who I was.

By Interpreter: There was no arrangement of that kind; instead of "Treatment", "Arrangement."

1501 Q. Did this man ever tell you he was going to turn you over to someone else?

[fol. 338] A. When he had locked me in I was in one room—in one dark room one day—one day and one night. He took me out to make a statement.

1502 Q. When Mr. Bailey got you to the Sheriff's office did he talk to you?

A. Yes.

1503 Q. How long did he talk to you at that time?

A. About a half an hour.

1504 Q. Was your brother there then?

A. Yes, he was there, but I didn't know where he was at.

1505 Q. Have you seen your brother since that time?

A. Yes, I seen him there because they took him out there.

1506 Q. When did you last see your brother?

A. That was all because I asked him where he was at and they told me they didn't know where he was at.

1507 Q. What day was that the last time you saw him?

A. I don't remember.

1508 Q. Was it the first day you were in jail?

A. About half of the time that I made there.

Mr. Simmons: I guess I understand that.

1509 Q. Now, when you were first taken to the jail Mr. Bailey and some other men talked to you, is that right?

A. Yes, sir.

1510 Q. How long did they talk to you?

[fol. 339] A. About an hour.

1511 Q. And then what did they do with you?

A. If I didn't tell them the truth they would pass me to Mexico where they would beat me and then I would tell them the truth.

1512 Q. Who was it that said that?

A. This mister that is here.

1513 Q. Is that Mr. Bailey?

A. Yes.

1514 Q. What did they do after that?

A. He told me if not he was going to put a little machine that they have so that I would tell the truth.

1515 Q. Was that Mr. Bailey, too?

A. Yes.

1516 Q. Then what happened?

A. That's all that they said to me that day; they took me to another room that was farther away towards the corner.

1517 Q. How long did you stay in that room?

A. Two days and two nights.

1518 Q. Was this the first room that you were put into by yourself?

A. That was the second room.

1519 Q. When did they put you in the first room?

A. The first day.

1520 Q. Was that right after Mr. Bailey talked to you?

[fol. 340] A. After.

1521 Q. Where was this room?

A. In the office right on the side—right to the side.

1522 Q. How long did you stay in that room?

A. One day and one night.

1523 Q. Describe that room for us.

Mr. Simmons: Tell him to describe it a little bit so you can translate it.

A. There was nothing in the room, there was no beds, no service, just a little hole along the floor.

1524 Q. Were there any windows in the room?

A. No, sir.

1525 Q. What was the floor made out of?

A. Cement.

1526 Q. What is this little hole you talked about?

A. Just a little hole that communicated down lower. I don't know what it is for.

1527 Q. How big was the room?

A. More or less a little bit smaller than one of the cells you have here.

1528 Q. Was there room to lay down on the floor and stretch out straight?

A. Yes, sir, you could.

1529 Q. Was there any bed in there?

[fol. 341] A. No, sir.

1530 Q. Where did you sit?

A. On the floor.

1531 Q. What time of the day did they put you in this room?

A. Immediately after we arrived there. There is where I arrived.

1532 Q. Was it in the morning or in the afternoon?

A. It was about ten or eleven of the day.

1533 Q. When did they take you out of that room?

A. The next day.

1534 Q. What time?

A. About nine.

1535 Q. In the morning?

A. Yes, in the morning.

1536 Q. What did you have to eat while you were in that room?

A. That day I didn't eat nothing.

1537 Q. Did they give you anything to drink?

A. No, sir.

1538 Q. Now, when they took you out of that room, what did they tell you?

A. They asked me again—asked me for my name.

1539 Q. Did you tell them?

A. Then I told them if they would turn my brother loose I would tell them the truth.

[fol. 342] 1540 Q. Did you tell them that when they let you out of the first room?

A. From the first room.

1541 Q. Were you put in another room?

A. Then when they put me in again they put me in another room.

1542 Q. What did they tell you when they put you in the second room?

A. That they had some more severe ones for me if I don't tell the truth.

1543 Q. By "Severe ones," are you referring to another room?

A. Yes, more punishable for me.

1544 Q. Did they put you in another room?

A. Yes, and they put me in the second room.

1545 Q. How long did they leave you there?

A. Two days and two nights.

1546 Q. What did they feed you while you were there?

A. Two times they didn't give me nothing to eat. They gave me breakfast—just breakfast.

1547 Q. Was that the first day or the second day?

A. The first day.

1548 Q. Did they give you anything to drink?

A. There was water and bed in there.

1549 Q. Were there any windows in this room?

A. Yes, there was.

[fol. 343] 1550 Q. How big were the windows?

A. Windows about like they have here in the cells to look out.

1551 Q. Was this room different from any of the other cells in the jail?

Mr. Sheldon: Just a moment, please. That is objected to as no foundation laid.

The Court: Sustained.

1552 Q. After you signed this paper, Exhibit No. 10, did they put you in a different kind of room?

A. Yes.

1553 Q. Was the second room they put you in any different than the room they put you in after you signed Exhibit No. 10?

A. It was different.

1554 Q. How was it different?

A. This one was different because it had a bed and the service of water.

1555 Q. Was it different than the rooms they put you in after you signed that?

A. After that they put me where there were more prisoners.

1556 Q. Who else was in the first room with you?

A. There was nobody.

1557 Q. Who was with you in the second room?

A. I heard someone about two cells on down, but I didn't [fol. 344] see anyone.

1558 Q. Were you by yourself?

A. Yes, I was alone.

1559 Q. Was there any light in that room?

A. There was none.

1560 Q. Who did you talk to for those two days and nights you were in that room?

A. I talked to the companion there about two cells away.

1561 Q. Did you get to talk to anyone else?

A. No, sir.

1562 Q. Did you see the man you were talking to?

A. No, I didn't see him.

1563 Q. Why couldn't you see him?

A. Because it was dark and in the two cells you could not see.

1564 Q. Who was it told you they were going to put you in a different room if you did not tell the truth?

A. This mister that is here.

1565 Q. Is that Mr. Bailey?

A. Yes.

1566 Q. After you had signed Exhibit No. 10, (Indicating) did they tell you something about getting better treatment?

A. Yes. They told me they were going to give me better treatment if I told the truth.

[fol. 345] Mr. Sheldon: I move to strike the answer as not responsive.

The Court: Overruled.

We will recess until one-thirty o'clock.

(Whereupon an adjournment was taken until one-thirty o'clock P. M., the same day, Thursday, November, 1949.)

[fol. 346] Thursday, November 17, 1949, one-thirty o'clock P. M., Court convened pursuant to adjournment and the following proceedings were had, viz.:

(Reporter's note: Whereupon the Jury was again admonished and excused until the following day, Friday, November 18, 1949, at nine o'clock A. M., and the proceedings continued out of presence of the jury.)

Mr. Agapito Gallegos, the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct examination.

Continued by Mr. Simmons:

1567 Q. Mr. Gallegos, at any time you were in jail in El Paso, Texas, did anyone try to frighten you?

A. Just what I have told you before a little while ago.

1568 Q. Are you referring to something that happened here in court or something you told me personally?

A. What has happened in this Court?

Mr. Simmons: Is he asking a question?

By Interpreter: That is what he said, "What has happened in this Court?"

Mr. Simmons: Strike that out.

[fol. 347] 1569 Q. At any time when anybody was talking to you at the jail in El Paso, Texas, did they act like they were trying to scare you?

Mr. Sheldon: To which the state objects for the reason that the question has already been asked and an answer given.

The Court: Overruled. He may answer.

Read him the question.

(Question read by the court reporter.)

A. Yes, sir.

1570 Q. Tell us when that was?

A. When they started to investigate me.

1571 Q. Was that the first day you were in jail or the second day or the third day?

A. The first day.

1572 Q. Tell us what happened.

A. They tried to get words out of my forcibly by another sheriff that is there.

1573 Q. Do you know who that other sheriff was?

A. I don't know what his name is.

1574 Q. Have you seen him here in this court room?

A. No, sir.

1575 Q. What did he do?

A. He would not take his eyes away from me and he [fol. 348] seemed like he wanted to hit me and I was frightened and I didn't know what to do.

1576 Q. Do you know who Mr. Bailey is?

A. When I see him I believe so.

1577 Q. Was he there at the time this man did what you are talking about?

A. He alone took me.

1578 Q. What did he do?

A. That's all he done.

1579 Q. Did this same man talk to you more than once?

Mr. Sheldon: To which the state objects for the reason that it does not appear from the question what he means by "This man," whether he means the unidentified man or Mr. Bailey.

Mr. Simmons: I mean the unidentified man.

Strike it. I will reframe it.

1580 Q. Did this man whose name you did not know who tried to frighten you, did he talk to you more than once?

A. Just two times.

1581 Q. When was the first time?

A. The second day that they investigated me. The second day that I got there.

1582 Q. Was that before or after you were put in the first small room?

[fol. 349] A. After.

1583 Q. When was the second time that this man talked to you?

A. When I gave myself guilty.

1584 Q. Was he present when you made some statement about your wife?

A. No, sir.

1585 Q. When was it he talked to you?

A. Then is when he talked to me.

1586 Q. The second time he talked to you was it before or after they put you in the second room?

A. They had taken me from the second room.

Mr. Simmons: That is all, you may cross-examine.

Cross-examination.

By Mr. Sheldon:

1587 Q. Agapito, when was the first time you ever came to the United States from Mexico?

Mr. Simmons: Objected to as incompetent, irrelevant and immaterial.

Mr. Sheldon: Well, he has introduced in evidence statements to the effect that the man apparently was fearful of being transported. I think we have a right to show if there was any previous record of illegal crossing.

[fol. 350] The Court: Overruled. He may answer.

By Interpreter: Will you read the question please?

(Question read by the court reporter.)

A. In '47.

1588 Q. And where did you cross at that time?

Mr. Simmons: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. By Laredo.

1589 Q. Where is Laredo with respect to El Paso?

A. I don't know. I don't know.

1590 Q. Did you have a permit or a visa to cross at that time?

Mr. Simmons: I object to that as incompetent, irrelevant and immaterial; it has no bearing on anything that happened voluntarily in the county jail at El Paso in September of 1949.

The Court: Overruled.

A. No, sir.

1591 Q. After you had crossed in 1947 did you again return to Mexico during that same year?

A. Yes, sir.

1592 Q. You returned from Mexico into the United States again in 1948?

[fol. 351] A. In '48.

1593 Q. Where did you cross into the United States at that time in 1948?

Mr. Simmons: The same objection.

The Court: Overruled.

A. Right there in the same place.

1594 Q. At that time when you came into the United States in 1948 did you have any permit or visa to enter the United States?

Mr. Simmons: The same objection.

The Court: Overruled.

A. No, sir.

1595 Q. Now, on both of those occasions when you crossed into the United States from Mexico, once in 1947 and once in 1948, did you know that if you were caught you would be returned to Mexico?

Mr. Simmons: The same objection.

The Court: He may answer. Read him the question.

(Question read by the court reporter.)

A. Yes.

1596 Q. Agapito, do you know anyone by the name of Francisco Gallegos?

A. In Mexico, yes.

1597 Q. Is he any relation to you?

[fol. 352] A. She is a woman.

1598 Q. It is true, is it not, that at the time you were arrested in El Paso you told the officer that your name was Francisco?

Mr. Simmons: Just a minute now. I object to that as a statement that has nothing to do with anything here and a statement made by a man when he was arrested, the first time he was arrested, which is later proved to be untrue, is not indicative of anything concerning his honesty or character or anything concerning the offense for which he is arrested.

Mr. Sheldon: It is very material; and if I recall correctly, Mr. Simmons also inquired about the name "Francisco" on direct examination.

The Court: He may answer.

A. Yes.

1599 Q. And is it not also true that the reason you told the officer your name was Francisco was because you were

afraid that you would be identified as the person who had killed a woman at Minatare, Nebraska?

Mr. Simmons: Just a minute. I object to that as incompetent, irrelevant and no foundation laid, improper cross-examination and beyond the scope of the direct.
[fol. 353] The Court: That will be sustained.

1600 Q. Why did you tell the officer your name was Francisco?

Mr. Simmons: Just a minute. I make the same objection.

The Court: Overruled.

A. Because for to defend myself for something I might have done.

1601 Q. Now, isn't it true, Agapito, that regardless of where you were kept in the jail in El Paso or what anyone said to you or did to you, you wanted to tell them what you told them because it was the truth?

Mr. Simmons: Just a minute. Now, I object to that as improper cross-examination.

The Court: Sustained.

1602 Q. What you did tell the officers in El Paso was the truth, was it not?

Mr. Simmons: I object to that as incompetent, irrelevant and immaterial, improper cross-examination, beyond the scope of the direct examination and an attempt of the County Attorney to force the defendant to testify against himself contrary to the provisions of the Constitution of the State of Nebraska and the Constitution of the United States.
[fol. 354] The Court: Sustained.

1603 Q. Agapito, Mr. Bailey did not ever strike you or beat you, did he?

A. He has not; he just frightened me and told me he was going to take me in front of the Immigration.

1604 Q. And no one ever struck you or beat you while you were in custody of the officers in El Paso, did they?

A. No; they just frightened me.

1605 Q. And no one ever threatened to harm your brother, did they?

Mr. Simmons: I object to that as no foundation laid to show whether he knows or not.

1606 Q. If you know.

A. I don't know because I didn't know where they had him.

1607 Q. You didn't ever hear anyone say that they were going to strike or beat your brother?

A. I have no knowledge of that; I never got to see him or talk to him.

1608 Q. Did you ever while you were in jail in El Paso ask to talk to your brother?

A. Yes, I asked them.

1609 Q. Whom did you ask?

A. I asked this mister that is here.

1610 Q. What did he say?

A. That he was around there; he was going to look for him.

[fol. 355] 1611 Q. Do you remember what day it was that you asked to talk to your brother?

A. I do not have present the day that it was.

1612 Q. How long had you been working with your brother on the job which you were on at the time you were arrested?

A. Working, we had a day and a half.

1613 Q. And had you been with him before that time?

A. No, sir.

1614 Q. How long had it been since you had seen your brother before the time that you were working with him on this job?

A. About four months.

1615 Q. Do you know where your brother was during the times when you were in the United States in 1947?

A. He was at home.

1616 Q. Where is his home?

A. In Valparaiso, Zacatecas.

1617 Q. Now, is it correct that you have stated here that you were frightened by the men in the El Paso jail by the fact that——(Interrupted)

By Interpreter: May I stop you there?

Mr. Simmons: I object to that question as having been asked and answered by the County Attorney.

Mr. Sheldon: You don't know what the question is [fol. 356] yet.

Mr. Simmons: That is right.

Mr. Sheldon: How do you know it has been asked and answered.

Mr. Simmons: Well, it is a complete question as it is.

Mr. Sheldon: If the Court please, the Interpreter asked to have the question broken up.

Withdraw the previous question, please.

1618 Q. Now, you have stated that the men in the jail at El Paso frightened you because of the way they looked at you, is that correct?

A. Probably so. I don't know why.

Mr. Simmons: Your Honor, I doubt if the witness understands the question. I would like to have it re-worded and asked again.

The Court: Read the question again.

(Question read by the reporter.)

A. No.

1619 Q. What was it which they did which frightened you?

A. Threatened.

1620 Q. How did they threaten you?

A. The first time with a little machine that they were going to put on me. I don't recognize the machine; I don't [fol. 357] know the machine.

1621 Q. Do you know the name of the machine?

A. I don't know.

1622 Q. Were you told what the machine would do?

A. No; they didn't tell me what that machine would do.

1623 Q. Why did it frighten you?

A. Because I don't know all of that—or I don't recognize all of that.

1624 Q. But you say no one struck you?

A. No.

1625 Q. And no one ever raised their arm as if they were going to strike you?

A. The other fellow.

1626 Q. What other fellow?

A. The other one that investigated me.

1627 Q. Where did he do that?

A. In one room that he had there where he was investigating me.

1628 Q. How did he threaten to strike you?

A. With his hand.

1629 Q. Did he strike you at that time?

A. He just raised his hand.

1630 Q. Did he say he was going to strike you?

A. He said he was going to hit me because I would not [fol. 358] tell him the truth.

1631 Q. But he still did not hit you?

A. No, he did not hit me.

1632 Q. Where were you in the room at that time?

A. I don't understand.

1633 Q. This man that you have been telling us about was in a room with you at this time, is that not true?

A. We were both alone.

1634 Q. And this man was sitting in a chair, was he not?

A. Yes.

1635 Q. And you were sitting in a chair, were you not?

A. In another chair.

1636 Q. And you were quite a distance apart from each other while you were talking, were you not?

A. The table. (Indicating)

Mr. Simmons: Let the record show that the witness is pointing to the reporter's table which is approximately one foot from the witness' chair.

1637 Q. Do I understand you to say that he was sitting on one side of the table and you on the other side?

A. And I was on the other side.

1638 Q. How large a table was it?

A. About the size of this one here.

By Interpreter: Pointing to this table.

[fol. 359] (Reporter's note: Indicating court reporter's table.)

Mr. Simmons: Let the record show that the reporter's table is what—two and one-half feet by three and one-half feet?

Mr. Sheldon: It is larger than that. I would say three by four.

(Mr. Simmons measures table.)

Mr. Simmons: Twenty-seven inches by forty-one inches.

1639 Q. You were both sitting in the manner you have told us about at all times while you were talking together, is that not true?

A. What?

Mr. Sheldon: You mean he does not understand the question?

1640 Q. All of the time while you were talking, both of you were sitting in the chair just like you have said?

A. During the time—two times—we were like that.

1641 Q. Mr. Bailey gave you some smoking tobacco while you were in jail, did he not?

A. Two times.

1642 Q. And he, also, gave you some change or money on one occasion, did he not?

[fol. 360] A. Money. He gave me fifty cents.

1643 Q. You were never afraid of Mr. Bailey, were you?

A. No, sir.

1644 Q. He treated you very nicely at all times, did he not?

A. He changed later. Just when he first caught me, later he changed.

1645 Q. In what way do you mean he changed?

A. At first he would frighten me with threats that he was making to me, and then he was against me. After I told him to turn my brother loose and I told him some of the truth, then he changed towards me.

1646 Q. In what way did he change toward you after that?

A. He would talk to me in a good way to me and that I would appreciate or like better.

1647 Q. That was before you had made the statement which was written up and which you signed, was it not?

A. Yes.

1648 Q. You remember being in a room with Mr. Bailey and Mr. Pedregan on Friday after you had been in jail for a few days?

A. Yes.

1649 Q. And they talked with you at that time, did they not?

A. Yes.

1650 Q. And after they talked to you did they write up a paper?

A. Yes.

[fol. 361] 1651 Q. And Mr. Pedregan translated this paper to you, did he not?

A. Yes, after he has made it.

1652 Q. Handing you what is marked as Plaintiff's Exhibit No. 10, I would like for you to look at it. (Exhibit No. 10 handed to the witness.) Calling your attention to the signature in the lower right hand corner, that is your name is it not? (Indicating)

By Interpreter: He said, "This one?" (Indicating) and I said, "Yes, sir."

A. It is.

1653 Q. And you signed your name on that paper after Mr. Pedregan had translated it to you?

A. When they made it they laid it there for me to sign, then he read it to me.

1654 Q. He read it to you before you signed it, did he not?

A. Yes. Where it was at.

1655 Q. You were not afraid at the time you signed that paper, were you?

Mr. Simmons: I object to that as incompetent, irrelevant and immaterial, improper cross-examination and attempting to prove the state's case out of the mouth of the defendant in violation of the law of the State of Nebraska, the Constitution of the State of Nebraska, and the Con-

[fol. 362] stitution of the United States of America.

The Court: Sustained.

1656 Q. Were you afraid at the time you were talking to Mr. Pedregan?

Mr. Simmons: Just a minute. I make the same objection.

The Court: Overruled.

Mr. Simmons: I object also on the grounds it calls for a conclusion of the witness and a legal proposition that

the defendant is not capable of understanding or answering.

Mr. Sheldon: That is the same words Mr. Simmons used.

Mr. Simmons: I would like to refer to the record.

The Court: I believe he used the words "Frightened" and "Scared."

Mr. Sheldon: I will withdraw the question then and use Mr. Simmons' terms, if I may.

1657 Q. At the time you were talking to Mr. Pedregan you were not frightened, were you?

Mr. Simmons: I object to that as calling for a conclusion of the witness, improper cross-examination, attempting to prove the state's case out of the mouth of the defendant in violation of the laws of the State of Nebraska, [fol. 363] the Constitution of the State of Nebraska and the Constitution of the United States.

The Court: Overruled.

A. Yes, I believe so. Quite a bit.

1658 Q. Why were you frightened at that time?

Mr. Simmons: Object to that as calling for a conclusion of the witness, no foundation laid and improper cross-examination.

The Court: Overruled.

A. Because it is the first time that I enter—the first time that the law takes me.

1659 Q. Do you mean to say that you were nervous at that time?

A. Uh-huh.

1660 Q. But you were not afraid of being harmed bodily, were you?

A. No.

1661 Q. Agapito, there have been several times during your life when you had but one meal a day, have there not?

Mr. Simmons: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

1662 Q. Now, is it correct, Agapito, that during the time you were in jail in El Paso you were in three different rooms?

A. In three different rooms.

[fol. 364] 1663 Q. Now, the one which you said you were in the first time, you were in how long?

A. One day and one night.

1664 Q. Is that the room which you said was right next to the office?

A. Near the office.

1665 Q. You are sure that you weren't in that room for just a short time—about an hour or so?

Mr. Simmons: Objected to as arguing with the witness.

The Court: Overruled.

A. Where at?

1666 Q. In the first room next to the office?

A. One day and one night.

1667 Q. And then you were put into a different room on the morning of the second day, is that correct?

A. Yes.

1668 Q. That room had a window and a bed and a chair and water?

A. Yes, minus a mattress.

1669 Q. And then the last room you were put in also had a window, a bed, a chair and water, did it not?

A. The mattress on the cement.

1670 Q. That is in the last room that you were in?

A. Yes, where there were a lot.

1671 Q. You had no bed in the last room—just a mattress?

[fol. 365] A. Just a mattress.

1672 Q. Was the last room which you were in any better than the second one which you were in?

A. It was better.

1673 Q. In what way was it better?

A. Because I had where I could lay down.

1674 Q. You said you had a bed in the second room, did you not?

A. Minus a mattress.

1675 Q. Isn't it true that there were windows in all of the rooms which you were in in the jail?

A. In the second one, yes; there I seen there is a window.

1676 Q. Has anyone told you to say that you were frightened when you were in the room with Mr. Pedregan and Mr. Bailey?

A. No.

1677 Q. Has anyone told you anything about what you should say in court?

A. No.

1678 Q. Now, when you were in this last room which you have referred to, there were other people in there with whom you could talk, were there not?

A. Yes, there was.

1679 Q. Now, Agapito, you talked with Mr. Bailey and Mr. Pedregan out in the hall here at noon, didn't you?

A. Yes.

[fol. 366] 1680 Q. And when you saw them you smiled and went up and shook their hands, did you not?

A. Yes.

1681 Q. And you visited with them for several minutes about the weather and things in general about Texas, did you not?

A. A little. A little I seen them.

Mr. Sheldon: I believe that is all.

Mr. Simmons: That is all.

Witness excused.

[fol. 367] Mr. Bob Bailey, recalled as a witness on behalf of the plaintiff, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Sheldon:

1682 Q. You are the same Bob Bailey who has been previously sworn and testified as a witness in this case, are you not?

A. Yes, sir.

1683 Q. Now, Mr. Bailey, the defendant has taken the stand here just prior to your re-entrance into the court room and has testified with regard to certain rooms or cells in which he was placed while in the custody of your office in El Paso County, Texas. Now, will you state what was the first room into which the defendant was put, when he was put there and approximately how long he remained in that room?

Mr. Simmons: I object to this as incompetent, irrelevant and immaterial. There is no foundation laid. This man has testified already that he took the defendant and gave him to the jailer and he does not know what happened to him between the time he turned him over to the jailer and the time he was brought back to him.

Mr. Sheldon: I do not believe he testified to that effect with respect to the first room.

[Vol. 368] The Court: Overruled.

1684 Q. If you know, Mr. Bailey.

A. I took him up to the 5th floor, to the jailer's office, and booked him, and they placed him in the hold-over, which is a cell right out in front of the jailer's office where they hold prisoners until they get them to take them to the cell blocks, and they placed him in there, and I don't know—from then I don't know where they placed him.

1685 Q. Do you know approximately how long he stayed in that room?

A. In the hold-over it wouldn't be over thirty minutes.

Mr. Simmons: This question is whether you know. That would be yes or no.

A. Well, I know how long they hold them; it isn't over thirty minutes.

Mr. Simmons: I move to strike the answer as not responsive.

The Court: Sustained.

1686 Q. Do you know when he was taken out of that room, Mr. Bailey?

A. No, I don't.

1687 Q. The defendant has testified here in regard to a room somewhere in the jail which had no window, which had no furnishings whatsoever in it, and in which there was a hole in the approximate center of the floor of the room. Is there such a room or cell in the El Paso County jail?

[fol. 369] A. Yes, sir.

1688 Q. What is the cell used for?

A. Well, it is used as punishment for prisoners that violate the jail rules.

1689 Q. Did you instruct anyone to place the defendant in that room at any time?

A. No, sir.

Mr. Simmons: I move to strike the answer and interpose an objection as incompetent, irrelevant and immaterial.

The Court: Overruled.

1690 Q. To your knowledge was the defendant ever placed in that room?

A. No, sir.

Mr. Simmons: I object to that, there is no showing of proper foundation.

The Court: He has answered.

Mr. Simmons: I move to strike the answer and object to the question as no sufficient foundation laid. The record shows he does not know.

The Court: Overruled.

1691 Q. In regard to that room, what is the fact as to whether or not there are any so-called services in the room?

A. So-called what?

1692 Q. Services or facilities of any kind.

[fol. 370] A. Yes, there is.

1693 Q. What are they?

A. There is water and a toilet.

1694 Q. What is this hole in the center of the floor, if you know?

A. Well, he has made a mistake about that. There is no hole in the center of the floor.

1695 Q. Now, do you know when the defendant was

placed into the second room or cell which he was confined in?

Mr. Simmons: I object to that. I do not believe that that is understandable to the witness unless he has heard the testimony, and there is no showing that he knows.

The Court: Sustained.

1696 Q. Well, do you know? Do you know when the defendant was placed into a second cell or room?

A. No. You mean into a cell block? Another cell block? Moved from one cell block to another one?

1697 Q. Yes.

A. No. I know he was moved from one cell block to another one; I do know that, but I don't know the date.

1698 Q. And, in other words, he was in two different cell blocks during his custody?

A. Yes, sir.

1699 Q. Are you familiar with the cells in both of those blocks?

[fol. 371] A. Yes, sir.

1700 Q. Will you describe the cells in each block?

A. Well, they are the same kind of cells, they accommodate two persons and have two bunks and have a lavatory, toilet, and they are about eight by ten—that is, eight feet wide and about ten feet long.

1701 Q. Now, the defendant has testified that on the occasion of the Friday upon which a certain statement was taken from him by yourself and Mr. Pedregan, that he was frightened. Did you at any time during the proceedings relating to the taking of that statement, or did any one else to your knowledge, ever threaten the defendant in any way or manner?

A. No, sir.

Mr. Simmons: Objected to as having been asked and answered.

The Court: Overruled.

A. No, sir.

1702 Q. Did you, or did anyone else to your knowledge, ever so much as raise their hand as if to strike the defendant?

A. No, sir.

1703 Q. Did you observe the defendant's appearance and demeanor at that time?

A. Yes, sir.

1704 Q. Will you describe that as well as you can?

[fol. 372] Mr. Simmons: Objected to as incompetent, irrelevant and immaterial and no foundation laid.

Mr. Sheldon: It is rebuttal, Your Honor.

The Court: Overruled.

Mr. Simmons: If this is rebuttal, I suggest there is nothing in the evidence produced by the defendant that—I will withdraw my objection.

Mr. Sheldon: He testified he was frightened at that time.

Mr. Simmons: I will withdraw my objection.

A. Well, he was calm and he wanted to make the statement and he made the signed statement, and after he got through, well, he said that he felt better that he had it off of his mind.

1705 Q. Did he do or say anything that indicated fright?

A. Not a thing.

Mr. Sheldon: You may cross-examine.

Cross-examination.

By Mr. Simmons:

1706 Q. This room we are talking about, is there a lavatory or something in there?

A. There is a regular—which room?

1707 Q. This room without the windows.

[fol. 373] A. The dark room?

1708 Q. Yes.

A. It has a regular toilet in it.

1709 Q. Does it have any furniture in it?

A. That's all. That is all it has. In the northeast corner—in the northwest corner of the room is a regular toilet, and that is all there is in the room.

1710 Q. How big a room is it?

A. It's about eight by eight.

1711 Q. A cement floor?

A. Cement floor.

1712 Q. What floor? That is, what floor of the jail is it on?

A. That is on the fifth floor.

1713 Q. That is different from this receiving room that you talked about?

A. Oh, yes.

1714 Q. How far from the receiving room is it?

A. It's—you mean in feet?

1715 Q. Well, just generally how far?

A. Well, it's about—I'd say one hundred feet.

1716 Q. Now, you say there was water in this dark room?

A. Yes, sir.

1717 Q. Is there a lavatory in there?

A. No, no lavatory.

[fol. 374] 1718 Q. Where does the water run?

A. The water is just a fountain.

1719 Q. It is a drinking fountain, you mean?

A. Yes.

1720 Q. A bubble type fountain?

A. Yes, that you turn on.

1721 Q. It has a little faucet?

A. Like this one out here. (Indicating)

Mr. Simmons: That is all.

Mr. Sheldon: That is all, Mr. Bailey.

Witness excused.

Mr. Sheldon: At this time the state offers in evidence Plaintiff's Exhibit No. 10.

Mr. Simmons: To which the defendant objects for the reason that the evidence now conclusively shows that the defendant was illegally detained at the time said statement was made, the statement being taken on the 23rd day of September, 1949, and had been illegally detained from September 18, 1949, without any charge being filed against him, without ever being taken before a magistrate, and for the further reason that the same was made under inducements, threats and a situation whereby the defend-[fol. 375] ant was incarcerated in solitary confinement, deprived of food and subjected to other forms of mental duress shown by the record, and for the further reason that the statement was made upon the defendant having

offered to make a statement on the promise that his brother would be released from jail, and for the further reason that the evidence does not show that the defendant understood the nature of the statement, what its use may be, or that he was advised of his constitutional rights to refuse to make any statement, to demand the assistance of counsel, and for the further reason that the same purports to be signed by the defendant and therefore is within the purview of the order of this Court of October 28, 1949, and that an exact copy of the same was not furnished to counsel for the defendant as ordered by the Court in the order of October 28, 1949; for the further reason that there is no evidence whatsoever in the record here to show in any particular that the person named in the information is now deceased; for the further reason that there is no evidence whatsoever the human body discussed in the evidence was the body of any known person, and that the person whose body was found, that death resulted [fol. 376] from any criminal act whatsoever, and for the further reason that the information in this case does not state a cause of action for the crime for which it purports to state, and for the further reason that the State of Nebraska has not shown beyond a reasonable doubt or in any particular or under such conditions that any presumption of any kind can arise that said act was free and voluntary or made in compliance with the laws of the State of Texas, the laws of the State of Nebraska, the Constitution of the State of Nebraska, or the Constitution of the United States of America, and for the further reason that the same, if true, contains no evidence material to the crime of second degree homicide; for the further reason that the same does not show in any particular that the defendant at any time had any intention of killing anyone.

Mr. Sheldon: If the Court please, the State of Nebraska, in connection with Mr. Simmons' objection submits that all of the matters contained in said objection have been previously presented to and ruled upon by the Court with the exception of the significance of the circumstances and [fol. 377] facts surrounding the defendant's custody in El Paso, Texas, which are at this time before the Court solely for the purpose of basing a determination as to

whether or not those facts alone would, as a matter of law, render the alleged confession to be involuntary, and further respectfully represents to the Court that if the Court desires we would be pleased to be heard on that subject.

The Court: The objection will be overruled.

Mr. Sheldon: If the Court please, that is, Mr. Simmons' objection is overruled and the Exhibit is received in evidence?

The Court: Yes, sir.

(Which said Plaintiff's Exhibit No. 10, so offered and received in evidence is made a part of this record and may be found on the following page hereof.)

[fol. 378] PLAINTIFF'S EXHIBIT No. 10

Date Sept. 23, 1949

THE STATE OF TEXAS,

vs.

AGAPITO GALLEGOS

I, Agapito Gallegos, after having been duly warned by Bob Bailey, the person to whom this confession is made; First, that I do not have to make any statement at all, Second, that any statement made will be reduced to writing and signed by me and may be used in evidence against me on my trial for the offense concerning which this confession is herein made, wish to voluntarily state the following facts for the reason that said facts are true, viz:

My name is Agapito Gallegos, and I am 38 years of age; I was born in La Florida, Zacatecas (Valparaizo), and at present consider the following address my home Box 49, Ysleta, Texas.

I crossed at Laredo, Texas in the month of December of 1947.

I do not remember the exact day of the month. I was accompanied by my two children, Francisca Gallegos, aged 14, my son Pedro Gallegos, aged 11 years, and Mrs. Geno-

veva Carrillo. This is the woman that I was living with in Valpar-iso, Zacatecas. I caught a ride with my children and Mrs. Genoveva Carrillo to Minatare, Nebraska. I went to the same ranch where I had been employed before I retugned to Mexico. As soon as I arrived at Minatare, Genoveva started running around with other men. This made me very angry. We had several arguments about it and she started to mistreat my children and she threatened to kill my daughter, Francisca. Towards of the first of September, she became more abusive to me and my children. We were quarrelling (Genoveva and I) and got into a fight and during this fight I picked up a piece of stove wood, as we used a wood stove and I hit Genoveva three times in the head. I hit her one time and knocked her down and hit her two more times while she was down. My daughter, Francisca was in the adjoining room and she heard the commotion and came into the room where Genoveva was lying on the floor. I examined Genoveva to see whether she was breathing and examined her pulse and found out that she was dead. As all of this happened at night I had a shovel in the room and proceeded to dig a grave about twenty feet from the door of the house; then went back into the house and wrapped her body (Genoveva's) in a blanket and carried it out and placed it in the grave and covered it up and levelled off the dirt on top so it could not be told that there had been an excavation; then went to bed. I continued to work on this farm until the latter part of October 1948. I then went to a trucker who was leaving Nebraska for Texas and rode with him as far as Laredo. Both of my children were with me. We crossed the International Bridge into Mexico and we took a bus to Torreon, where we remained one day; then took the train to Fresnillo, Zacatecas and from there to Valparaiso on a bus. While I was in Valpar*ia*so Genoveva's sister, Margarita Carillo, asked me about her sister, Genoveva and I told her that she had remained in Nebraska. I remained in Valparaiso until the latter part of March 1949 and again started back to the U. S. I crossed into the U. S. at Socorro, Texas. The next day I obtained employment. I worked there until I was arrested. I do not know the rancher's name in Neb. where all of this happened.

The above statement was read to me by Mr. A. M. Pedregon and is true and correct.

Agapito Gallegos.

Witnesses: —— ——, Witness, Bob Bailey, Witness.

[fol. 379] Mr. Mahlon C. Morgan, recalled as a witness on behalf of the plaintiff, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Sheldon:

1722 Q. Your name is Mahlon C. Morgan?

A. It is.

1723 Q. You are the same Mr. Morgan who has previously been sworn and appeared as a witness in this case?

A. I am.

1724 Q. You are the Sheriff of Scotts Bluff County, Nebraska?

A. I am.

1725 Q. And were at all times from after September 27th of this year?

A. Yes.

1726 Q. Sheriff Morgan, did you go to El Paso, Texas?

A. I did.

[fol. 380] 1727 Q. And take into your custody the defendant in this case, Agapito Gallegos?

A. I did.

1728 Q. When, if you recall, did you go to Texas for that purpose?

A. I think it was on the 27th of September, and returned the next day.

1729 Q. When did you arrive in Gering upon return from El Paso?

A. I believe now it was the 29th instead of the 28th that I arrived here.

1730 Q. Do you remember what day of the week it was, Sheriff Morgan?

A. I believe it was on Thursday.

1731 Q. Your best recollection at the present time is that your returned to Gering with the defendant on September 29th?

A. Yes.

1732 Q. And what did you do when you returned to Gering?

A. The first thing I did was lock up my prisoner and go to bed.

1733 Q. Where did you lock him up?

A. In the county jail.

1734 Q. Do you recall what time of the day or night it was when you arrived at Gering?

A. I think it was perhaps one o'clock in the morning.

1735 Q. When did you again see the prisoner?

A. I think I brought him down on Saturday morning. [fol. 381] I don't recall that I talked to him—I know I didn't talk to him on Friday because I had no interpreter that day.

1736 Q. Do you recall when you did first talk with him?

A. I do recall now that Friday morning I gave him a pack of cigarettes.

1737 Q. When did you first talk to him through an interpreter?

A. Saturday morning.

1738 Q. Who was present at that time?

A. Mr. Lopez and Steve Warrick, our stenographer at the time he was brought down.

1739 Q. What Saturday morning is that that you refer to?

A. That is the first day of October.

1740 Q. Did you ever talk with him between the time you returned him and the first day of October—that is, with an interpreter?

A. No.

1741. Q. About what time of the day did that conversation take place?

A. About—a little after ten in the morning.

1742 Q. Who did the questioning—or who asked the questions, if you remember?

A. I asked the questions and they were translated by

Mr. Lopez and recorded by our stenographer who later wrote them up.

1743 Q. Were you present at all times during the taking of this statement?

[fol. 382] A. I was.

1744 Q. And what did you do after the statement was taken?

A. We went out to the scene of the crime.

1745 Q. Who was present then?

A. The Interpreter, Mr. Lopez, and Steve Warrick and myself and Millard Cluck.

1746 Q. Were you present at all times while the defendant was out at the scene of the alleged crime?

A. I was.

1747 Q. Now, Sheriff Morgan, at any time from the point that he was placed in custody in the county jail of Scotts Bluff County up to and including the conclusion of your interview with the defendant on the first day of October, or at any other time, did you ever see, hear or observe anyone, including yourself, make any threats, promises or inducements to the defendant or make any intimidating gestures toward him?

A. No, sir.

Mr. Simmons: Objected to as calling for a conclusion of the witness and no foundation laid.

The Court: Overruled.

1748 Q. I did not get your answer.

A. No, sir.

(Whereupon a statement was marked as Plaintiff's Exhibit No. 12 by the Court Reporter for the purpose of identification.)

[fol. 383] 1749 Q. Handing you what the reporter has marked for identification as Plaintiff's Exhibit No. 12, the same being a collection of nine typewritten sheets, I will ask you to examine it and state what it is, if you know?

A. This is a statement taken in the Sheriff's office October 1, 1949.

1750 Q. Is that the typewritten transcript of the defendant's statement to which you have referred?

A. It is.

1751 Q. Now, referring to the last page of Plaintiff's Exhibit No. 12 there appears thereon a notation in longhand, pen and ink, bearing the date October 3, 1949. Do you know who made that notation?

A. I did.

1752 Q. You made it?

A. I did.

1753 Q. Did you make it on the date indicated, October 3rd?

A. I did.

Mr. Sheldon: You may cross-examine.

Mr. Simmons: Your Honor, I may go into something that has been in the record. I am not sure.

[fol. 384] Cross-examination.

By Mr. Simmons:

1754 Q. Mr. Morgan, you arrived with the prisoner in Scotts Bluff County on September 29, 1949, is that your testimony?

A. I believe so. I believe it was about one o'clock in the morning on the 29th.

1755 Q. That would be the morning of the 29th?

A. Yes.

1756 Q. Now, you did not talk to the man until October 1st?

A. No.

1757 Q. And on that day he was taken out on the highway out here—out in the country?

A. He was talked to in the Sheriff's office prior to taking him out in the country.

1758 Q. And then he was taken out in the country?

A. Yes.

1759 Q. And then he was brought back?

A. Yes.

1760 Q. Since being brought back—he was brought back to your office, was he, and put back in jail?

A. I think he was put in jail after he came back.

1761 Q. Anyway, he was brought back to the court house?

A. Yes.

1762 Q. Since that return to the courthouse has the de-
[fol. 385] fendant ever been out of the courthouse?

A. No.

1763 Q. Now, the jail is on the third floor of the court house?

A. It is.

1764 Q. And the County Court is on the second floor of the courthouse?

A. It is.

1765 Q. What is the fact as to whether or not this man was ever brought before any other magistrate than Ted R. Feidler, County Judge?

A. Well, he was brought to this court where an attorney was appointed for him.

* * * * * * * *

STIPULATION

Mr. Sheldon: If the Court please, I think we have stipulated all of these matters, and it might be expeditious if we did not have to go over all of them. It was stipulated as to his custody and the only times that he went before a magistrate.

Mr. Simmons: I didn't know your stipulation went to the matter of a magistrate.

Mr. Sheldon: At least, I intended to stipulate to that, and if not I will do so at the present time.

Mr. Simmons: It is stipulated by and between the par-
ties that the defendant was never brought before a magis-
trate—has never been brought before a magistrate since
[fol. 386] the arrest of September 29, 1949.

The Court: Do you stipulate to that?

Mr. Sheldon: The first time the defendant was ever taken before a magistrate was on October 13, 1949.

Mr. Simmons: That is all.

Mr. Sheldon: I believe that is all at the present time, Sheriff Morgan.

Witness excused.

[fol. 387] Mr. J. W. Lopez, recalled as a witness on behalf of the plaintiff, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Sheldon:

1767 Q. You are J. W. Lopez?

A. Yes, sir.

1768 Q. You are the same Mr. Lopez who has been previously sworn as a witness in this case and testified?

A. I am.

1769 Q. Mr. Lopez, were you called to the County Court in Gering—or the County Courthouse in Gering, Nebraska, on the first day of October, this year?

A. I was.

1770 Q. And by whom were you called, if you remember?

A. By Sheriff Morgan—Mahlon Morgan.

1771 Q. What did you do when you got to the courthouse?

A. I came right up to his office and I spoke to him and he introduced me to Mr. Gallegos.

1772 Q. Were you requested to serve as an interpreter in the interviewing of the defendant?

A. Yes, sir.

1773 Q. Did you so serve?

[fol. 388] A. Yes, sir.

1774 Q. Will you describe, as nearly as you can, the manner in which that interview was conducted?

A. Well, we were all in the Sheriff's office, and Mr. Morgan was sitting behind his desk, and Mr. Warrick was sitting over at his desk; Mrs. Hauke was sitting just opposite Mr. Morgan and I was sitting next to the door that leads into the stenographer's room, and Agapito was sitting to my left.

1775 Q. And will you further explain the manner in which the interview was conducted?

A. Well, the first thing that Mr. Morgan told me to tell Agapito was that—— (Interrupted)

Mr. Simmons: Just a minute. I object to that as not responsive.

The Court: Sustained.

1776 Q. Did Mr. Morgan ask questions at that time?

A. Well, he asked me if I knew Mr. Agapito, or if I had ever seen him before.

1777 Q. Did he after that ask various questions and request you to in turn put them to the defendant?

A. Yes. Yes.

1778 Q. Did you do that?

A. Yes, sir.

1779 Q. And did the defendant reply to your questions?

[fol. 389] A. Yes, sir.

1780 Q. Did you in turn translate those replies back into English?

A. Yes, sir.

1781 Q. Now, do you recall whether or not the door to the Sheriff's office was open at the time you were having the interview with the defendant?

A. It was open.

1782 Q. Were people seen out in the other room passing two and fro during the interview?

A. Yes.

1783 Q. And you, of course, were present entirely throughout the interview that day, were you not?

A. Yes, I was.

1784 Q. After you had concluded the interview in the Sheriff's office, what did you then do?

A. Well, we then went out—we went and got in Mr. Morgan's car to go out to the farm east—northeast of Scottsbluff.

1785 Q. Were you present at all times out there at that scene?

A. Yes, sir.

1786 Q. Now, Mr. Lopez, at any time during the proceedings which you have explained here, did you ever see or observe anyone, including yourself, make any threats, promises or inducements to the defendant or make any intimidating gestures against him?

[fol. 390] Mr. Simmons: Just a minute. I object to that as calling for a conclusion of the witness and no foundation.

The Court: Overruled.

A. No, I didn't.

1787 Q. Handing you what has been identified as Plaintiff's Exhibit No. 12, I will ask you to examine it and state what it is, if you know?

A. These are the questions that Mr. Morgan and Mr. Warrick asked me to ask Mr. Agapito, and after having asked the question I inter—— (Interrupted)

Mr. Simmons: Just a moment. I object to that as not responsive. He just asked him what it was.

The Court: Sustained.

1788 Q. This is a typewritten transcript of the proceedings and the questions and answers which you have just been testifying about?

Mr. Simmons: I object to that as not a true reflection of the witness' testimony and leading.

Mr. Sheldon: I am asking him the question.

Mr. Simmons: Well, it is a leading question then.

Mr. Sheldon: It is foundational, Your Honor.

[fol. 391] The Court: He may answer.

A. Yes, that is the paper.

1789 Q. Now, did you ever talk with the defendant with regard to that typewritten transcript?

A. Yes, sir.

1790 Q. When was that, if you recall?

A. Well, just exactly I don't—just the exact number of days I don't know, but it was several days afterwards.

1791 Q. Well, assuming that October 1st, which is when the statement was taken in the Sheriff's office, was on a Saturday, would you be able to state approximately what the day of the next week was that you talked to him?

A. I think it was on the following Friday.

1792 Q. What did you do at the time you discussed this with the defendant?

A. I read all those questions and also read the answers back—read the answers in English and translated them in Spanish to Agapito, and also read what he had answered in Spanish to him.

1793 Q. Now, at the time when you started to take the statement on October 1st, did you tell the defendant anything with regard to whether or not he had to make a statement?

Mr. Simmons: Just a minute now. I object to that as [fol. 392] calling for a conclusion of the witness and unintelligible.

Mr. Sheldon: I will leave that up to the witness.

The Court: He may answer.

A. I don't remember Mr. Morgan saying he had to.

1794 Q. Well, did you tell the defendant anything in that regard?

A. No.

1795 Q. Now, going back again now to the time when you went over this statement, Plaintiff's Exhibit No. 12, with the defendant, will you explain further what was done at that time?

A. Well, Mr. Morgan told me to read that to Mr. Agapito and to read it very carefully, and for me to tell him that if any errors was made for him to call my attention to it. So Mr. Agapito and I went in the little room adjoining Mr. Morgan's office right east of his office, there we sat down next to the table, our chairs were quite close together, and then I read every question that was asked in Spanish and also the answer that he had given in Spanish, and I told him if there were any mistakes or any errors, "I want you to call my attention to it."

1796 Q. What is the fact as to whether or not you stopped after reading each individual question and answer and asked if it was correct?

[fols. 393-396] Mr. Simmons: I will object to the leading question.

The Court: It is leading, but he may answer.

A. I did.

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[fol. 397] MRS. HELEN HAUCK, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Sheldon:

1806 Q. Your name is Helen Hauck?

A. Yes, it is.

1807 Q. You are the stenographer and secretary employed jointly by the Sheriff's office and the County Attorney's office in Scotts Bluff County, Nebraska?

A. Yes, I am.

1808 Q. And were you not on the first day of October of this year acting in that capacity?

A. Yes, I was.

1809 Q. And were you present at and did you take notes upon an interview conducted on that date in the Sheriff's office at which time the defendant Agapito Gallegos was interviewed by Sheriff Morgan in the presence of yourself and Deputy Sheriff Warrick with Mr. J. W. Lopez acting as Interpreter?

A. Yes, sir.

1810 Q. And did you take down in shorthand notes the questions asked by Sheriff Morgan and also the answers given by the defendant as interpreted by Mr. Lopez?

A. Yes, I did.

[fol. 398] 1811 Q. And did you then transcribe those shorthand notes into longhand typewritten language?

A. Yes.

1812 Q. Handing you what has been identified as Plaintiff's Exhibit No. 12, I will ask you to examine it and state whether or not that is the transcript of that interview?

A. Yes, it is.

1813 Q. And does that correctly reflect the shorthand notes which you took at the time of the interview?

Mr. Simmons: I will object to that as incompetent, irrelevant and immaterial and calling for a conclusion of the witness and not the best evidence, and hearsay. The only way she can refresh her recollection is from her shorthand notes.

Mr. Sheldon: I am asking her if she has compared them.

A. Yes, I have.

Mr. Simmons: I make the same objection.

The Court: Overruled.

1814 Q. Did your original shorthand notes correctly and accurately represent what was said by Mr. Morgan and what was said by Mr. Lopez as Interpreter?

A. Yes.

Mr. Simmons: I am going to object to that as hearsay [fol. 399] and calling for a conclusion of the witness and immaterial.

The Court: Overruled.

1815 Q. Now, Mrs. Hauck, you, of course, were present at all times during this interview, were you not?

A. Yes, I was.

Mr. Simmons: I object to the leading form of the questions. She is your stenographer, you can ask her.

The Court: Overruled.

1816 Q. Now, at any time during that interview did you observe anyone, including yourself, make any threats, promises or inducements to the defendant or make any intimidating gestures toward him?

A. No, I did not.

Mr. Simmons: Just a minute. I object to that as calling for a conclusion of the witness, no foundation laid, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Sheldon: You may cross-examine.

[fol. 400] Cross-examination.

By Mr. Simmons:

1817 Q. Mrs. Hauck, you wouldn't state that that document was in exactly the same form now as it was when you finished preparing it?

A. It is in the very same way with my corrections on it.

1818 Q. What do you mean, your corrections?

A. I made several typographical errors and I corrected them after I read the statement through.

1819 Q. It is in exactly the same form as when you finished typing it?

A. Yes, it is.

1820 Q. No changes?

A. No. Only the typewritten—I mean the longhand note that Mr. Morgan put at the bottom of it.

Mr. Simmons: All right, then I move to strike that.

1821 Q. You do not know who put that on there, do you?

A. It is in Mr. Morgan's handwriting.

1822 Q. Were you present when he put it on?

A. No.

1823 Q. Everything else is exactly the same as when you finished typing it?

A. Yes.

[fol. 401] Redirect examination.

By Mr. Sheldon:

1824 Q. Mrs. Hauck, you have been asked as to typographical errors which you corrected. Will you state in what manner you corrected those typographical errors?

A. In pen and ink.

1825 Q. And were those corrections made by making reference to your original notes?

A. Yes, they were.

Offer of Plaintiff's Exhibit No. 12

Mr. Sheldon: The state offers in evidence Plaintiff's Exhibit No. 12.

Mr. Simmons: To which the defendant objects for the following reasons. One, it is not the best evidence. Two, it is hearsay. Three, it contains matters which are incompetent, irrelevant and immaterial to this or any other proceedings and includes matters which are prejudicial. It also is obviously incorrect in many particulars; it also includes legal conclusions in the questions; for the further reason there is no showing—or the record now conclusively shows that the same was taken when the defendant was being held illegally and after having been illegally returned to the State of Nebraska, the same was taken under [fols. 402-403] duress because of the illegal confinement and illegal detention; also that there is no evidence of any kind before the Court showing that any crime has been com-

mitted or that the person named in the information is now deceased, or that the laws of the State of Nebraska were complied with in any particular, or that the defendant was advised of his legal rights, or is there any evidence showing that the statement was properly interpreted or understood by the defendant. There is nothing in the statement connecting it with the defendant in any manner. For the further reason that the questions contained therein are leading and would be incompetent in a court of law in other particulars; for the further reason that there are marks on the Exhibit which may or may not have significance which have not been identified and their origin has not been shown in the record; for the further reason that the state has not shown that the same was taken under circumstances entirely voluntary or in compliance with the laws of the State of Nebraska, the Constitution of the State of Nebraska, the Constitution of the United States or in compliance wih due process of law.

* * * * * * *

[fol. 404] PLAINTIFF'S EXHIBIT No. 12

CONSISTING OF 9 SHEETS

This statement is taken in the Sheriff Office October 1, 1949, at 10:35 AM. Mr. Lopez acting as interpreter, Deputy Sheriff Warrick and Mahlon C. Morgan, Sheriff, present and Helen Hauck reporting.

Mr. Lopez has first explained to Agapita Gallegos that he is interpreting for us and that we would like to take a statement of facts in the death of Genovesa Carillo which occurred about September 1, 1948, and her burial about five miles east and three-quarters of a mile north of Scottsbluff on the Alec Bower farm where we removed the body September 24, 1949, from a grave about 16 feet east of the house where he was living at the time of the death.

Q. Will you tell him anything he might say at the present time can be used against him in the case filed here in this county?

A. I understand.

Q. Ask him if he is willing to give us a statement of the facts in this case?

A. I am, voluntarily.

Q. Ask him if Genovesa Carrillo was with him about September 1, 1948?

A. Yes sir.

Q. Were they living as man and wife?

A. Yes sir, but she don't want to live right with me then.

Q. And who else was living there with him at that time?

A. Miss Pancho Gallegos, my daughter, and my son Pedro.

(Carl Mowery came into the room during the questioning)

Q. What are their ages at that time?

A. Pancho 14 and Pedro 10 going on 11.

Q. Ask him what happened to Mrs. Carillo?

A. She was fighting with my daughter and my family and I was always having trouble with her, giving her advise. My advises were to live right and in peace.

Q. Ask him if he killed this woman?

A. Yes sir.

Q. And where did that occur?

A. In the house where he was living.

Q. And ask him where this house is located?

A. I don't know. I can't tell you from here. I don't know where I am at this time. I can't tell you which side or the direction.

Q. Was it east or west of Scottsbluff?

A. I can't tell directions here.

Q. Ask him if he knows where Scottsbluff is?

A. No sir, I don't know. I don't even know where I was at here.

Q. Ask him if he knows Carl Mowery?

A. Yes sir.

Q. Was it near where Carl Mowery lived?

A. It is a little ways from there. I figure approximately about five or six miles.

Q. Ask him if he remembers the place was being farmed by Alec Bower?

A. No sir, I never did know what his name was.

Q. Ask him this question—Is he will- to go out to the

place and identify the place that he was living at the time he killed Mrs. Carillo?

A. Yes sir, I am.

[fol. 404-1] Q. Ask him if he buried the body at that place?

A. Yes sir.

Q. Ask him if she had her clothes on at the time she was buried?

A. Yes.

Q. Ask him what time in the night it was, was it day or night?

A. It was night.

Q. Include in there when he murdered this woman?

A. In the night.

Q. How late at night?

A. Just a little bit after it got dark.

Q. Did his daughter witness this death?

A. She didn't see it because we had already turned the light when we started talking. She just heard.

Q. And how did he kill this woman?

A. With a stick. I picked up a piece of stove wood, not to kill her but to frighten her and she fought back at me after I hit her she fell down. She was laying on the floor telling me many things. I hit her again two times after she had fallen down. I left her there and we both, my daughter and I, stood there very sad over what had happened. Then my daughter and I watched over her all night. Just before daybreak I covered her with a blanket. I left her there and went to work. Just as it was getting dark that day I started to dig a grave. We were all very sad and afraid and didn't know what to do. I mean by we my daughter and I, because my boy was asleep. That's all we did. I quit work there.

Q. As I understand it, he left her there in the house all day after he killed her and dug a grave that night after dark?

A. That's right.

Q. Did any body come to the house that day?

A. No, nobody came. She was at the house all day.

Q. Then, his boy knew also that she had been killed?

A. No, he didn't have an account of it because I would

not let him enter this one room. There was a department between these two rooms.

Q. Which room did this death occur in, the one with a door in it or the other one?

A. In the other room.

Q. You mean in the room to the east, ask him how many rooms this house had in it?

A. Two.

Q. Ask him if it was a small room she was killed in?

A. Yes.

Q. And that is the one to the east?

A. Yes sir.

Q. And where was the boy sleeping?

A. He was sleeping in the room with the door that goes outside.

(Millard F. Cluck, Jr., enters the room during the questioning)

Q. At the time she was killed then, she was in the east room where her bed was?

A. Yes sir.

[fol. 404-2] Q. Was there more than one bed in that room?

A. Yes, just one bed.

Q. The boy and the girl were sleeping in the other room?

A. Yes, in the next room.

Q. At the time he killed this woman was she fully clothed?

A. With my clothes. She used my clothes, had my pants on.

Q. Ask him to—what she wore other than his pants and were these pants overalls?

A. They weren't all blue but they were halfway blue.

Q. How about the upper part of her body?

A. A shirt; a woman's shirt.

Q. Then what else over that?

A. I don't remember. She had a shirt and a shrock, a kind of a sweater. I don't remember whether it was white I don't remember what color.

Q. Was she fully clothed, did she have shoes on?

A. She had taken off her shoes because we were going to bed.

Q. Did she have anything on her head?

A. She had a handkerchief, I don't remember what color but she had a handkerchief over her head.

Q. Would that be a black scarf?

A. It possibly could be.

Q. Did he wrap her in anything before he buried her?

A. Yes, in one blanket.

Q. What color was that blanket?

A. It was striped blanket. It had red stripes and white stripes.

Q. Did she wear any jewelry at the time he buried her?

A. She didn't have any jewelry. She might possibly have a ring. She used to wear a ring on her hand.

Q. Ask him if this is the ring (Mr. Morgan hands Mr. Lopez ring)

A. Yes, I believe so.

(Carl Mowery leaves).

Q. What hand was that ring worn on?

A. I don't remember.

Q. Did she have that ring on constantly?

A. Yes, she always wore it.

Q. Now lets get back to the grave where was the grave in relation to the house? Which direction and about how far away?

A. East. There was a toilet there and from the toilet over about five or six feet east.

Q. Which way was she buried? How was she buried directionally? Was her head to the north, east, south or west?

A. Head to the north.

Q. How deep was this grave?

A. About to my waist.

Q. And how was she buried, was she buried on her back? Did he lay her on her back in the grave or otherwise?

A. On her back.

Q. Now ask him if he put this handkerchief in her mouth ask him when he put—What time of the night was it when he buried her?

A. About 8:00 o'clock that night.

[fol. 404-3] Q. It had been dark for some time then?

A. Yes.

Q. Ask him if any body came to the place from the time he killed her until he buried her?

A. Yes, the farmer came to see me in regard to work but he didn't know anything about this.

Q. Did the farmer inquire where Mrs. Car-illo was?

A. He did.

Q. And what did you tell him?

A. I told him that she had gone because she never stood still one place. She was always running around.

Q. Ask him how long he lived at this place after he murdered this woman?

A. About a month and a few days.

Q. And what date was it he left there?

A. I don't remember what day but I left there in December.

Q. Ask him if he left in the December of what year?

A. In '48.

Q. Ask him how long he was there after he got his settlement from the farmer?

A. Oh, it must have been about eight days.

Q. Ask him if he worked for anyone else after he made settlement with this farmer?

A. Yes, I kept working there at piling beet tops for another farmer.

Q. What was his name?

A. I never did even know him. I went with other Mexicans that were there and they gave me a job.

Q. Did he at any time tell another Mexican that if Mrs. Carillo didn't behave herself, he was going to kill her?

A. No sir, I never told that or said that to any body.

Q. Now, as I understand it, Mrs. Car-illo was killed one night before they went to bed and was buried the following night?

A. That's right. That's how I told you. That's exactly right.

Q. And she was buried in a grave east of the toilet, east of the house in which he was living?

A. That's right.

Q. And she was buried in a grave that he dug north and south with her head to the north?

A. Yes sir.

Q. Who was present at the time this burial took place?
A. Nobody, I was there by myself.
Q. How long did it take to dig this grave and bury the woman?
A. About two hours.
Q. I would like to know when he put the handkerchief in this woman's mouth?
A. When she had died, when I went to bury her.
Q. Was that the night he killed her?
A. No sir.

Questions by Mr. Warrick:

Q. Ask him when he put it in her mouth? and why.
A. So that dirt and trash wouldn't enter into her mouth.
[fol. 404-4] Q. Ask him if he didn't have her head covered with that blanket?
A. Yes sir.
Q. Ask him if he didn't put that handkerchief in her mouth when they were fighting in on the bedroom floor?
A. No sir.
Q. Ask him whose handkerchief it was he used?
A. It was mine.

Questions by Mahlon C. Morgan:

Q. Was there anything else buried in this grave?
A. No sir, just her.
Q. What became of her baggage?
A. She had a little clothing and it is in Mexico.
Q. How did it get there?
A. I took it with me when I left.
Q. When did he go back to Mexico?
A. In December.
Q. And where did he cross the border?
A. At Laredo, Texas.
Q. And who was he with when he left here?
A. Just me and my children and the trucker.
Q. Who was the trucker?
A. I don't know what his name was. He was a Mexican.
Q. Did he pay for transportation?
A. Yes sir.
Q. How much?
A. I gave him $15.00 for each one.
Q. How much money did he take into Mexico?

A. $350.01

Q. How much of this money belonged to Mrs. Carillo?

A. She worked separate because she never offered to help me.

Q. Did she have any money at the time he killed her?

A. She had 150 Mexican pesos.

Q. What became of that money?

A. That money I spent because I didn't take any money over there.

Q. What did he do with the clothes he took back to Mexico belonging to Mrs. Car-illo?

A. It is in my home in Mexico.

Q. Where is that?

A. Ofardillo, Mexico.

Q. What state is that in?

A. Zac-tacas.

Q. Is that where his children are now?

A. No.

Q. How far south of the border is that?

A. I don't know but you can leave on the train about 4:20 from El Paso and you will arrive there between 6 and 7 in the evening.

Q. By traveling all day?

A. No, you leave about 4:20 in the afternoon and you travel all that night and the following day and you will arrive the next evening between 6 and 7.

[fol. 404-3] Q. Is that where his wife lives?

A. No, my wife lives on further south.

Q. Are the children with the mother?

A. No sir, they're with my father and my mother.

Q. And what is the wife's name and where does she live?

A. Tomsa Castillo. I don't know just where she lives because she left about five years ago.

Q. Now ask him this, if he has written any letters to any one in this County since he killed Mrs. Carillo?

A. I have just written to one friend of mine, Polircato Franco.

Q. In English that is Paul?

A. Yes.

Q. Ask him if he ever told any body about killing this woman?

A. No sir, I have never told any body.

Q. Then ask him how did her daughter find out about the murder?

A. I don't know.

Questions by Mr. Warrick:

Q. Ask him if he can tell us about what day it was he killed this woman?

A. I don't remember but more or less it was around the first of October or the first part of October.

Questions by Mr. Morgan:

Q. How long had he known this woman?

A. I have known her about a year in Old Mexico and I came here and she always wanted to come here and I didn't want to bring her. Then I went back and she said she didn't want to stay and so she came with me but in all I knew her about two years.

Q. Then when did he bring her across?

A. This December passed was a year.

Q. Then they had been living here as man and wife since that time?

A. Yes and no, when she came here she changed a lot and I wanted her to live with me but she made other friends and she didn't want to live with me.

Q. I thought in the statement he gave to the Deputy Sheriff at El Paso that he stated that they came across in 1948 some time?

A. I don't know exactly but we crossed the line on the 25th day of December. I don't know what year but it was a year ago last December.

Q. How long were they in Nebraska?

A. Me and my family just one year from December to December.

Q. Did any one in Old Mexico ever make inquiry about her, where Mrs. Carillo was?

A. Yes sir, her sister.

Q. What was the sister's name?

A. Margaret Carillo.

Q. And where does she live?

A. In Valpera-so.

Q. How old is this daughter?

A. She is 40 some, more or less 40.

Q. Ask him what age Genovesa was?

A. About 44.

[fol. 404-6] Q. Was she in good health?

A. She never was in very good health. She was sick twice since we came to this country.

Q. What kind of sickness was that?

A. One time she was constipated and could not have a bowel movement at all and the next time she had a hemorrhage.

Q. Did she use alcoholic beverages of any form?

A. No.

Q. Ask him if he uses alcohol in any form?

A. No, I don't use any. My wife was taking pills subscribed by some doctor in Scottsbluff.

Q. Did you take here to the doctor?

A. No, I never took here to the doctor but Carl Mowery took her.

Q. What did he tell the sister when she inquired about Mrs. Carillo?

A. That she had stayed here in the United States.

Q. What was her reply?

A. She said I am not a bit surprised because I knew she wouldn't stay with you because when you left here she done as she wanted to.

Q. Ask him this question, when he knotted that scarf that was around her neck?

A. I didn't do that.

Questions by Mr. Cluck:

Q. Did he have hold of the knot on the neckerchief when he was hitting her?

A. No sir, I didn't recall whether she had a handkerchief around her neck. I don't remember.

Questions by Mr. Warrick:

Q. Did he draw any blood when he hid her with the stick?

A. Yes, I drew blood. I hit her back of the ear and it drew blood.

Questions by Mr. Morgan:

Q. Which side of the head was that?

A. I don't remember whether it was left or right but I think it was on the left side.

Q. Which hand did he strike her with and was she faceing him at the time?

A. Yes she was facing me. I hit her with the right hand.

Q. Did she fall down at the time he struck her the first blow?

A. Yes sir.

Questions by Mr. Cluck:

Q. When he hit here and she fell on the floor or did she fall on the bed the first time he struck her?

A. She fell on the floor.

Q. Then did she get up?

A. She fell down and she appeared to me about half fainted but she continued talking. Then I gave her two more blows back here on the neck.

Questions by Mr. Morgan:

Q. At that time then she was face down?

A. She was not face down, she was kind of on her side.

[fol. 404-7] Q. How many time did he strike her when she was in that position?

A. Just two times.

Q. Then when did he decide that she was dead?

A. In about five hours.

Q. Was it daylight then?

A. It was still dark.

Q. Did she lay there on the floor all night or did he pick her up?

A. No, I lifted her up and I laid her on the blanket on the floor.

Q. Now did he put the handkerchief in her mouth before he put her on the blanket?

A. No.

Q. When was that done?

A. When I went to bury here the next day.

Q. Was she screaming prior to the time he struck her the last two times?

A. No, she was not screaming, she was just talking.

Q. Was she making any struggle during this time?

A. She just wanted to get up to fight.

Q. Did she at any time strike him?

A. No, because she couldn't reach me.

Q. What became of the stick he struck her with?

A. I burned it because it was laying there.

Q. Did it have blood on it?

A. No.

Q. Was there any blood on the floor after this happened?

A. Yes, there was.

Q. Very much?

A. No, just a little bit.

Q. Where did the blood come from?

A. From the blow behind her ear.

Q. Was the skin broken there?

A. No, I don't know whether the skin was broken or not. I don't know where the blood came from but blood was there.

Q. Did the blood come from her ear?

A. I don't know.

Q. Does he know whether the blood came from her mouth or nose?

A. Yes, from her mouth and her nose.

Questions by Mr. Cluck:

Q. Did he clean up the blood on the floor?

A. I did.

Questions by Mr. Morgan:

Q. Ask him if he would like to go out to this place and show us where it occurred?

A. Yes sir, I am here at your service. Anything you want me to do.

Q. Ask him if he has been abused in any way since arrested, or if we have made any threats or promises?

A. I have not been promises, been abused or given bad threats I have been treated very nice thanks to God up to the present time.

[fols. 404-8-478] Q. We are going to transcribe this statement and we are going to ask Mr. Lopez to read it to him, go over it with him very carefully and make corrections if there has been mistakes made?

A. I understand.

Q. And tell him that this statement will be used against him and to be sure that anything that he has told us has been the truth?

A. Yes sir.

Q. Everything that he has told us is the truth?

A. It is the truth, yes sir.

Q. What we would like to do right now is to go out to the place and have him show us where it occurred and ask him if he is willing to do that?

A. Yes, I am ready and willing to go at this time.

Q. Why did you use the name Francisco at the time you were arrested in Texas?

A. I was trying to hide my identity because I was afraid of the crime I had committed here.

Oct 3 1949 Mr Lopez went over this statement this day and Agipito Gallegos states it is correct except where notations are made on page 5.

M. C. M.

[fol. 479] Mr. Sheldon: The state rests, Your. Honor.

DEFENDANT'S MOTION TO STRIKE

Mr. Simmons: Comes now the defendant and moves the Court to strike all of the evidence in the record concerning any plea which may have been made by the defendant in the County Court of Scotts Bluff County, Nebraska, on the 13th day of October, 1949, for the reason that the record now shows a complete lack of evidence that the person named in the information, Genovesa Carrillo, is deceased; and for the further reason that all of the evidence shows that a human body was exhumed, there is no evidence whatsoever as to the cause of the death of this body or that the body is that of a woman or a man, and therefore, there

being a complete lack of any proof that any crime has been committed; for the further reason that the information in this action does not state a cause of action against the defendant for the crime of second degree murder and for the further reason that the defendant was arrested in El Paso County, Texas, on September 19, 1949, and was subjected to physical and mental duress while being held in custody in El Paso County, Texas, and was held illegally in El Paso County, Texas, and was not properly extradited [fol. 480] and removed from the State of Texas to the State of Nebraska; for the further reason that the provisions of the Uniform Criminal Extradiction Act were not complied with, and after being brought illegally into the State of Nebraska was held illegally without being brought before a magistrate until October 13, 1949, having never been brought before a magistrate after his arrest in El Paso County, Texas, until being brought before the County Judge in Scotts Bluff County, Nebraska, on October 13, 1949; and for the further reason that at the time the plea was made in the County Court of Scotts Bluff County, Nebraska, the plea was made through the same interpreter who was used by the Sheriff of Scotts Bluff County, Nebraska, in investigating the case and in the presence of the Sheriff and the two deputy sheriffs of Scotts Bluff County, Nebraska, and through the same interpreter and before the same deputy county attorney who was present when he was interviewed on October 1, 1949, under circumstances indicative of duress and while he was being illegally detained and while he had been illegally brought into the State of Nebraska; and that the circumstances conclusively show that the same influences which were [fol. 481] exerted over the defendant at the time of making the statement on October 1, 1949, existed in the mind of the defendant at the time of his plea in the County Court due to the fact that the plea was made substantially in the presence of the same persons who were holding him illegally, and for the further reason that the record does not show at any time that the illegal and coercive influences exerted upon the defendant in El Paso County, Texas, had been removed by any affirmative act of any official of the State of Nebraska at the time said plea was made; and for the further reason that the record con-

clusively shows that the complaint was not properly interpreted to the defendant.

The Court: The motion is overruled.

DEFENDANT'S MOTION TO STRIKE

Mr. Simmons: Comes now the defendant and moves the Court that the confession or Exhibit 10, and testimony of the witness Bailey and the witness Pedregan be stricken from the record for the reason that the evidence conclusively shows that the statements made by the defendant in their presence were tainted with illegality in failure to bring the defendant before a magistrate as required by the laws of the State of Texas, and for the further reason [fols. 482-525] that the coercive effect of the illegal detention and physical and mental duress conclusively shows said statement to be involuntary.

The Court: Overruled.

DEFENDANT'S MOTION TO STRIKE

Mr. Simmons: Comes now the defendant and moves the Court to strike all of the testimony of the witness Lopez and Exhibit 12 for the reason that the evidence shows that the same was taken under circumstances whereby the defendant was being detained illegally and was in the state and county illegally, there having been no proper extradiction from the State of Texas, and the statements being made some twelve days after he was originally arrested, and that during said entire period he had never been brought before a magistrate in direct violation of the laws of the State of Texas and the laws of the State of Nebraska, whereas the record shows conclusively he could have been brought before a magistrate long before said date in both Texas and in Scotts Bluff County, Nebraska.

The Court: Overruled.

* * * * * * *

[fol. 526] STIPULATION

It is stipulated by and between the State of Nebraska and the defendant that at the time the body referred to in the evidence in this case was removed from the grave located on the Alex Bauer farm that said body was in a

[fol. 527] state of advance decomposition, that it would have been impossible to identify the person by any facial characteristics or appearances whatsoever, and that no positive identification as to whether the body was that of a man or a woman was ever made, and that the only basis for making such a determination was the evidence relating to the type, condition and arrangement of the hair appearing on the body, exclusive of the defendant's own statements.

. . . . . .

[fol. 528] (Whereupon the court reporter read the stipulation previously dictated into the record as follows:

STIPULATION

"It is stipulated and agreed by and between the plaintiff, the State of Nebraska, and the defendant, Agapito Gallegos, that at all times from on or about Monday, the 19th day of September, 1949, until this date that the defendant Agapito Gallegos has been in custody either of the authorities of El Paso County, Texas, or of the authorities of Scotts Bluff County, Nebraska, and that from on or about the 19th day of September, 1949, until on or about the 27th day of September, 1949, he was incarcerated in the county jail of El Paso County, Texas, and since his return to the State of Nebraska on or about Wednesday, the 28th day of September, 1949, until this date has been in custody of the Sheriff of Scotts Bluff County, Nebraska, and incarcerated in the county jail of Scotts Bluff County, Nebraska.

[fols. 529-565] "Mr. Simmons: Now, may we stipulate a little further than that, Your Honor?

It is stipulated further that during the entire period referred to in the above stipulation until October 13, 1949, that the defendant was never brought before any magistrate in the State of Texas or the State of Nebraska.

Mr. Sheldon: I do not think it is material, but we are perfectly willing to stipulate to it.

The Court: It is so stipulated:"

. . . . . .

[fol. 566] DEFENDANT'S MOTION TO STRIKE

Mr. Simmons: Comes now the defendant at the close of all the evidence and moves the Court to strike all of the evidence of the witnesses Feidler, Lopez, Bailey, Pedregan, Warrick, Hedge, Shrader and Hauck for the reason that the evidence in this case now shows a failure of proof entirely that any crime has been committed; that the person named in the information and complaint is deceased; for the reason that the complaint and information do not state a cause of action, of the crime of second degree murder; for the reason that the evidence conclusively shows that so far as the testimony of the witnesses Feidler, Shrader, Hauck and Warrick and Hedge are concerned that it is hearsay, and that so far as the testimony of the witness Lopez in the County Court of Scotts Bluff County on October 13, 1949, the evidence conclusively shows that the defendant did not understand the nature of the complaint which was read to him at that time, and conclusively shows that the same was not properly interpreted to him [fol. 567] or fails to show that it was properly interpreted inasmuch as the witness Lopez stated on the stand that he could not swear under oath that the proper translation had been given for the word "Purposely," the word "Purposely" being the only indication in said complaint which distinguishes the material element between manslaughter and second degree murder, and there being other errors in the translation of the complaint as conclusively shown by the evidence of the State of Nebraska; and for the further reason that the evidence conclusively shows that the defendant was arrested in El Paso county, Texas, on September 19, 1949, and was never brought before a magistrate in the State of Texas or in the State of Nebraska until October 13, 1949, and that all statements made by him during said period were obtained illegally because he was detained illegally inasmuch as the illegal detention is a form of coercion and duress, and the State of Nebraska has not shown that any of the statements taken from the defendant during said period were free from said coercion and duress, and for the further reason that the evidence conclusively shows that the defendant was illegally re- [fols. 568-573] moved from the State of Texas to the State of Nebraska; for the reason that the Uniform Crimi-

nal Extradiction Act was not complied with and that the laws of the State of Texas and State of Nebraska were not complied with in any particular concerning this detention until October 13, 1949, and that the evidence conclusively shows that the defendant was placed in solitary confinement in a room without windows and without furniture for one night and one day and was not fed, and that after being taken out of said room was advised that if he did not make a statement that he would be placed in a worse room, and thereafter was placed in another room where there was no light, where there was a bed but no mattress, and where he was given one meal for a period of two days and two nights, and that upon being removed from said room he advised the jailer that he would make the statement that the sheriffs wanted if they would release his brother from custody.

The Court: Overruled.

[fol. 574] SUPREME COURT OF THE UNITED STATES

No. 347, Misc., October Term, 1950

ORDER ALLOWING CERTIORARI—Filed June 4, 1951

The petition herein for a writ of certiorari to the Supreme Court of Nebraska is granted. The case is transferred to the appellate docket as No. 781, now No. 94, October Term, 1951.

[fol. 575] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed August 11, 1951

Comes now the petitioner and respondent and jointly stipulate that pursuant to the approval of the Supreme Court of the United States, the original Bill of Exceptions prepared in the District Court of Scotts Bluff County,

Nebraska, and used by the Supreme Court of the State of Nebraska when said matter was reviewed by the Supreme Court of the State of Nebraska, may be forwarded to the Clerk of the Supreme Court of the United States for use in preparing the record in this case in the Supreme Court of the United States. It is further stipulated that all matters contained in the Bill of Exceptions are not material to any issue which can be raised in the Supreme Court of the United States and it is therefore not necessary to prepare in the record the entire Bill of Exceptions.

It is therefore stipulated that upon the request of the petitioner that the following matters shall be included in the record in the Supreme Court of the United States, the questions and answers numbers being those appearing in the Bill of Exceptions in the Supreme Court of the State of Nebraska.

Witness: Ted R. Feidler—Questions 406 to 432; Stipulation appearing at Page 84; Questions 433 to 448 (omitting objections offered and comments of the court which was withdrawn to Question 448); Questions 449 to 465; stipulation appearing at Page 95; Exhibits 4, 5, 6 & 7 received during the testimony of Ted R. Feidler.

Witness: J. W. Lopez—Questions 480 to 485; 487 to 510; 513 to 542; 551; 558 to 559; 563 and 564 and Stipulation appearing on Page 119 of the Bill of Exceptions.

Witness: Mahlon C. Morgan; Questions 567 to 573; 578 to 586; Stipulation appearing Page 134 to the bottom of Page 134.

Witness: Bob Bailey; Questions 616 to 631.

Witness: J. W. Lopez; Questions 817 to 827; 842 to 843; 853 to 856, including objections; 875 to 877.

[fol. 576] Witness: Ted R. Feidler, Questions 1068 to 1084; 1099 to 1103.

Witness: Bob Bailey—Questions 1177 to 1218; 1225 to 1303; 1375 to 1400; 1427 to 1440.

Witness: A. M. Pedregan, Questions 1448 to 1475 including stipulation appearing Page 330.

Witness: Agapito Gallegos, petitioner (All of his testimony, Questions 1476 to 1681).

Witness: Bob Bailey—Questions 1682 to 1721; offer and objection beginning Page 374. Exhibit 10.

Witness: Mahlon C. Morgan—Questions 1722 to 1765; stipulation appearing at Page 385.

Witness: J. W. Lopez—Questions 1767 to 1796.

Witness: Helen Hauk, Questions 1806 to 1825; offer and objection commencing Page 401; also Motion beginning Page 479; also stipulation beginning the fourth line from the bottom of Page 526; also stipulation beginning Page 528; also motion beginning at Page 566 (one motion only). *Exhibit 12.*

It is further stipulated and agreed that it is not necessary to a proper review of the federal questions raised that the entire transcript of proceedings in the Supreme Court of the State of Nebraska be included; that it is agreed between the parties that said petitioner desires that the following portions of the transcript of the Supreme Court of the State of Nebraska will be sufficient for purposes of review:

Petition in Error in the Supreme Court of Nebraska.

County Court Criminal Docket in the County Court of Scotts Bluff County, Nebraska.

Hearing on Arraignment in the County Court of Scotts Bluff County, Nebraska.

Information filed in the District Court of Scotts Bluff County, Nebraska.

Appointment of the Counsel dated October 15, 1949 in the District Court of Scotts Bluff County, Nebraska.

Hearing on Plea in the District Court of Scotts Bluff County, Nebraska October 25, 1949.

Stipulation Page 25 of the Transcript of the Supreme Court of the State of Nebraska.

Stipulation Page 31 and 32 of the Transcript.

Journal Entry in the District Court of Scotts Bluff County, Nebraska, dated November 19, 1949.

Verdict of the jury.

Motion for new trial filed in the District Court of Scotts Bluff County, Nebraska.

Journal Entry dated November 23, 1949.

The above stipulation is entered into subject to the right of the respondent of the State of Nebraska to request any additional portions of the Bill of Exceptions to be included [fol. 577] in the record in the Supreme Court of the United States and any additional portions of the tran-

script of proceedings in the Supreme Court of the State of Nebraska, also to be included even though they may not be mentioned herein.

Agapito Gallegos, Petitioner, By James B. Mertherd, By Mertherd, Wright & Simmons, His Attorneys.

State of Nebraska, By Clarence S. Beck, Attorney General, By Homer L. Kyle, Assistant Attorney General, State of Nebraska.

(6809)

In The

Supreme Court of the United States

—::—

OCTOBER TERM, 1951
NO. 94

—::—

AGAPITA GALLEGOS, PETITIONER,

V.

STATE OF NEBRASKA, RESPONDENT.

—::—

BRIEF FOR THE PETITIONER.

—::—

JAMES G. MOTHERSEAD,
FLOYD E. WRIGHT,
ROBERT G. SIMMONS, JR.,
Counsel for Petitioner.

WEKESSER PUBLISHING CO., Law Briefs, Lincoln, Nebr.

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ROBERT G. SIMMONS, JR.,
Counsel for Petitioner.

—::—

OPINION BELOW.

The opinion of the Supreme Court of Nebraska being reviewed appears in the case of *Gallegos* v. *State*, 152 Neb. 831, 43 N. W. (2d) 1.

JURISDICTION.

This case involves the federal constitutional question of the admissibility of confessions and plea of petitioner obtained from him during a period of 25

days unlawful detention before he was brought before a magistrate and before counsel was appointed to defend him. The federal question was first raised at the trial of petitioner in the District Court of Scotts Bluff County, Nebraska, when the prosecuting attorney offered said confessions (R.101; R.116) and plea (R.53, 55) in evidence; the objection being that the record showed that the petitioner had been held unlawfully without being brought before a magistrate for a period of 25 days and that said confessions and plea were not voluntary and their admission would be a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States and a violation of provisions against self-incrimination contained in the Fifth Amendment to the Constitution of the United States (R.101,116,53,55). The trial court overruled the objections and admitted said confessions and plea in evidence. The same constitutional question involved herein was raised before the Supreme Court of the State of Nebraska (R.1). The opinion of the court did not refer to any federal question.

QUESTION PRESENTED.

Are confessions and a plea obtained from a prisoner during a period of twenty-five days illegal detention by federal and state officers before being brought before a magistrate and before counsel is appointed to assist the prisoner admissible in evidence?

SPECIFICATION OF ERRORS.

The Supreme Court of Nebraska erred:

1. In holding that the Exhibit 10 (R.103) is admissible in evidence, when obtained during a period of twenty-five days unlawful detention.

2. In holding that Exhibit 12 (R.117) is admissible in evidence when obtained during a period of twenty-five days of unlawful detention.

3. In holding that the plea on arraignment (R.55) is admissible in evidence when obtained at the termination of twenty-five days of unlawful detention prior to appointment of counsel to assist prisoner.

STATEMENT.

The petitioner, a 38 year old illiterate Mexican peon, who could understand no English (R.13), and his brother (R.59), were arrested at the request of the U. S. Immigration and Naturalization Service (R.60, 68,69) in El Paso County, Texas, September 19, 1949 (R.60). They were taken from the place of arrest by the Chief Deputy Sheriff of El Paso County to the jail located in the El Paso County Courthouse in El Paso, Texas (R.61,65). Petitioner was interrogated by several experienced law officers. Upon denying his identity he was immediately confined (R.65). The confinement was in a room, approximately 8 feet square which had no windows (R.80,100) and no furniture. He was so confined for approximately 21 hours (R.65). He was then again interrogated by an experienced law enforcement officer (R.66). Upon petitioner's refusal to make an incriminating statement, he was again confined (R.66). This confinement was in a different cell, in a solitary cell which was dark. It did have ventilation. It did have an iron bed, but without a mattress (R.88,95). This confinement lasted

for approximately 48 hours (R.67). Petitioner was again removed and interrogated by an experienced law enforcement officer (R.67). He was reconfined for a period of 24 hours and again interviewed by an experienced law enforcement officer (R.70).

During these interrogations, petitioner was told that they would keep him locked up until he told the truth (R.78); that he would be placed in more severe rooms if he did not tell the truth (R.80); that he would be turned over to the Mexican authorities who would beat him if he did not tell the truth (R.79); that they would put a machine on him that would force him to tell the truth (R.80); and that his brother would be turned loose if he told the truth (R.81). At this time he told his inquisitors that he would tell them what they wanted to know if his brother was released (R. 81). (The only matters in this statement denied by the Texas officers and not found in the opinion of the Nebraska Supreme Court are those contained in this paragraph. On all other matters there is no factual dispute.)

On September 23, 1949, a written statement (Exhibit 10; R.108) was prepared in English which was translated and read to petitioner in Mexican and to which the petitioner attached his signature.

Thereafter, on the 27th day of September, 1949, the petitioner was removed from El Paso County to Scotts Bluff County, Nebraska, by the sheriff of Scotts Bluff County, Nebraska (R.132).

During this period of time no charge of any kind was ever brought against petitioner in any court in

El Paso County (R.14,68). He was never brought before a magistrate (R.132).

The petitioner arrived in Scotts Bluff County, Nebraska, on September 28, 1949, and was immediately incarcerated in Scotts Bluff County jail (R.106), which is located in the courthouse (R.109). He was not interviewed by anyone until October 1, 1949 (R.108). At that time, he was removed from the jail, interviewed by the sheriff, deputy sheriff and deputy county attorney through an interpreter (R.106) employed by the sheriff (R.106,44) named Lopez. The remarks made by Lopez in English purporting to be a translation of petitioner's statements were stenographically reported (R.114). The stenographic report (Exhibit 12, R.117) of the statements of Lopez was prepared in English and was translated by Lopez to petitioner (R.113).

The petitioner was first brought before a magistrate on October 13, 1949 (R.109,132).

After 25 days of confinement without being brought before a magistrate, contrary to laws of both Texas and Nebraska, petitioner was brought before the county judge of Scotts Bluff County, Nebraska, for arraignment. He was taken to the courtroom by the sheriff's officers. The sheriff who had brought him from El Paso, Texas, was present (R.30,9). Likewise, the deputy county attorney, who was present at the interrogation on October 1st, appeared to read the complaint (R.9). The complaint was interpreted by the same interpreter employed by the sheriff, Lopez (R.9).

The record is clear that in response to the purported translation of the complaint into Spanish, petitioner replied that he did not understand (R.9,57).

The county judge then requested the interpreter to explain the complaint (R.10). The record is clear that conversation occurred between petitioner and Lopez at that time (R.57), after which Lopez announced to the court that petitioner understood and plead guilty (R.9,58).

Thereafter, on October 15, 1949, the District Court of Scotts Bluff County appointed an attorney to represent defendant (R.11).

The purported statement (Exhibit 10, R.103) taken in El Paso, Texas, September 23, 1949, in substance stated that the petitioner resided on a farm near Minatare, Nebraska, with Genovesa Carrillo; that while residing there, they quarreled and on one evening "got into a fight and during this fight I picked up a piece of stove wood, as we used a stove, and I hit Genovesa three times in the head"; that thereafter he discovered that she was dead; that he dug a grave near the door of the house and buried her.

The purported statement (Exhibit 12, R.117), taken in Scotts Bluff County, Nebraska, on October 1, 1949, states that during a quarrel "I picked up a piece of stove wood, not to kill her but to frighten her and she fought back at me after I hit her she fell down. She was laying on the floor telling me many things. I hit her again two times after she had fallen down"; that he then stood over her body waiting for her to awaken, until daybreak, covered her with a blanket and on the

next evening just as it was getting dark, dug a grave and buried her.

At the trial of said cause (second degree murder), each of the alleged confessions and statements of the defendant were offered and received in evidence over the objection of the defendant that the same were not voluntary statements and their admission was in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States and the violation of provisions against self-incrimination of the Fifth Amendment of the Constitution of the United States (R.101,116). Likewise, the purported plea of guilty of the defendant in the county court upon arraignment was likewise admitted in evidence to the jury over the same objection (R.53,55). Upon submission the jury found the defendant guilty of manslaughter (R.16). He was sentenced to ten years (the maximum) in the Nebraska State Penitentiary (R.19) where he is now incarcerated.

The petitioner appealed to the Supreme Court of the State of Nebraska raising the admissibility of the above statements and plea along with other matters of local law (R.1). The Supreme Court of Nebraska overruled all contentions of the petitioner and affirmed the conviction, without discussing any federal or constitutional question or the matter of illegal detention, except to say (R.28):

> "The question as to the time in which the defendant should be given a preliminary hearing is a question for the court. There can be no precise length of time, after the arrest of the person, in which he must be given a hearing. The theory of the law is that he must be given a hearing as

soon as possible. The person charged should be given a preliminary hearing just as soon as the nature and circumstances of the case will permit."

SUMMARY OF ARGUMENT.

1. Twenty-five days of detention before arraignment is unlawful. Petitioner was arrested on September 19, 1949, in El Paso County, Texas. The first arraignment was on October 13, 1949, in Scotts Bluff County, Nebraska. The law of Texas and Nebraska requires arraignment before a magistrate as soon as possible after arrest. Confessions were obtained from petitioner on the fifth (in Texas) and the thirteenth (in Nebraska) day after arrest. Plea was obtained on the twenty-fifth day of unlawful detention. Detention of a prisoner after a reasonable time to take him before a magistrate is unlawful. Since the prisoner is under the control of the officers, the burden should be upon the officers to prove the reasonableness of the time in taking the prisoner before the magistrate when this matter is questioned. There is no record here justifying the necessity of the delay in arraignment. Therefore the detention was unlawful and the conduct of the investigation officer at the time that the confession was taken was unlawful.

2. Unlawful detention amounted to duress under the circumstances of this case. The petitioner was illiterate and uneducated. He was a citizen of Mexico and unfamiliar with judicial processes. He was questioned. Upon giving unsatisfactory answers he was placed in solitary confinement. After 5 days of questioning and solitary confinement, the first confession was obtained.

3. The constitutional inquiry into admissibility and confessions does not go to truth or falsity of statements, or to fact of whether or not such statements were in fact voluntary but goes to the surrounding circumstances and conduct of officers at the time confessions were obtained (*Watts* v. *Indiana*, 338 U. S. 49, 54). Since the conduct of officers was unlawful in not taking the prisoner before a magistrate, the confessions so taken were not within due process. The due process clause does not embrace an unlawful act.

4. Petitioner does not contend that all interrogation between arrest and arraignment violates due process of law. Only these confessions obtained after a reasonable time for arraignment has elapsed are inadmissible as violation of due process clause.

5. The confessions involved are not verified.

6. The illegal detention which accrued after the confessions is instructive of the attitude and conduct of the officers at the time of taking the confessions. It is therefore germane to the admissibility of each confession (*Haley* v. *Ohio*, 332 U. S. 596, 600).

7. Failure of the State to furnish counsel to prisoner, as a constitutional question, is only one aspect of due process of law. Failure to take a prisoner before magistrate prevents a prisoner from the enjoyment of the right of counsel and is therefore further indication that unlawful detention is a violation of due process of law.

8. The unlawful detention from September 19, 1949, to September 27, 1949, in El Paso County, Texas, was

by the U. S. Immigration and Naturalization Service. The first confession was obtained during this period. This court has held in *Lustig v. United States*, 338 U. S. 74, that illegal conduct of federal officers will not be tolerated.

9. Affirmance of the Supreme Court of Nebraska will create a precedent which will be construed as authority to use detention as a device for obtaining confessions and satisfactory pleas. Constitutional rights will be endangered. Officials, whose standard is "What can I get away with?" rather than "What is right?", will be encouraged. This court should rededicate these basic principles of unalienable rights as a guide to all official and private conduct.

ARGUMENT.

Admission of Confession Obtained During Period of Twenty-Five Days of Unlawful Detention is Not Due Process of Law.

As stated in the petition for certiorari, this case presents for the first time, so far as the writer knows, the clear cut issue of the effect of unlawful detention as a violation of due process isolated from other forms of duress. Although the petitioner alleged other forms of duress in addition, these were denied by the officers. The Supreme Court of Nebraska determined that this was a fact question. This fact question is not for presentation to this court.

Twenty-five Days Detention Before Arraignment is Unlawful.

The period of detention before arraignment is clearly shown by stipulation entered into between the State of Nebraska and the petitioner at the original trial (R. 132):

> "It is stipulated and agreed by and between the plaintiff, State of Nebraska and the defendant, Agapita Gallegos, that at all times from and on or about Monday the 19th day of September, 1949 until this date the defendant, Agapita Galloges has been in the custody either of the authorities of El Paso County, Texas or of the authorities of Scotts Bluff County, Nebraska and that from on or about the 19th day of September, 1949 until on or about the 27th day of September, 1949, he was incarcerated in Scotts Bluff County, Nebraska and inated in Scotts Bluff County, Nebraska on or about Wednesday the 28th day of September, 1949, until this date, has been in the custody of the sherriff of Scotts Bluff County, Nebraska, and incarcerated in the County jail of Scotts Bluff County, Nebraska.
>
> "It is stipulated further that during the entire period referred to in the above stipulation until October 13th, 1949, the defendant was never brought before any magistrate in the state of Texas or the State of Nebraska."

That the detention during this time is unlawful is shown by the Nebraska statutes, R. S. 1943, Sections 29-406, 29-410, and Section 29-412 (see Appendix). These have been interpreted by the Nebraska Supreme Court in the case of *Maher* v. *State*, 144 Neb. 463, 13 N. W. (2d) 631, to require a person be brought before a magistrate as soon as possible. The same rule appears to be the law in the State of Texas. *Ward* v. *Texas*, 316

U. S. 547, 86 L. Ed. 1663. In any event, in Nebraska, the law of Texas is presumed to be the same as the law of Nebraska unless proof is made to the contrary. R. S. 1940, Sec. 25-12,104; *In re Estate of Wiley*, 150 Neb. 898, 36 N. W. (2d) 483.

Arraignment cannot and need not be instantaneous with arrest. The time "as soon as possible" after arrest when a prisoner must be brought before a magistrate would necessarily vary with each individual arrest. Such factors as time and place of arrest, the conditions of travel from the point of arrest to the location of the magistrate and the convenience of the court, etc., must all be taken into consideration. It is lawful for an officer to hold a prisoner a reasonable time, considering these matters, before taking the prisoner before a magistrate.

Since the prisoner, during this period, is completely under the control of the officer, the officer is the one who must act in a reasonable time. When the reasonableness of the time is questioned, the officer should have the burden of proving that the time is reasonable.

Here, where the record demonstrates that the petitioner was a prisoner in courthouses, where presumably courts were in session and a magistrate available, twenty-five days before arraignment, the presumption should be that the arraignment could have been almost immediate.

Nothing in the record shows the necessity of any delay. In the absence of any evidence demonstrating the necessity of the delay, the court should find, as a matter of constitutional law, that the time before arraignment herein was unreasonable. (The Supreme Court of Ne-

braska did not pass on this question.). The detention was illegal. In not taking the prisoner before a magistrate in a reasonable time, the officers who had custody and took the statement (Exhibit 10, R.103 and Exhibit 12, R.117) were guilty of unlawful conduct.

Effect of Unlawful Detention.

The three items of evidence presented to the jury questioned here are the statement (Exhibit 10, R.103) taken September 23, 1949, the statement (Exhibit 12, R.117) taken October 1, 1949, and the plea on arraignment before the county judge, October 13, 1949 (R.55). The first statement (Exhibit 10, R.103) was obtained on the fifth, the second (Exhibit 12, R.117), on the thirteenth, and the plea on the 25th day of detention.

What then is the effect of the unlawful detention upon the admissibility of the confessions obtained during that period and the plea of guilty at the end of that period without the benefit of counsel?

Unlawful Detention as Duress.

Duress can be both physical and mental. Detention, alone without other factors, can be mental duress. This may be especially so here where petitioner is a citizen of Mexico, uneducated, unable to read or write.

Petitioner was arrested and questioned. He denied his identity. After further questioning he was placed in solitary confinement for twenty-four hours. He was then again questioned. He again denied his identity. After further questioning he was again returned to solitary confinement. After further solitary confinement for two days and two nights he was again taken before

experienced law enforcement officers and again questioned. On the fifth day after further solitary confinement for twenty-four hours he was again questioned. After five days of this treatment petitioner realized in his own illiterate and unedjcated way that these experienced law enforcement officers who had custody of his person and his future desired that he tell them that he had killed Genovesa Carrillo. Petitioner undoubtedly realized that he would either do what these experienced law enforcement officers desired of him or they would continue to keep him in solitary confinement until he did. He yielded and made the statement (Exhibit 10, R.103).

Perhaps five days of such treatment would be inadequate to obtain an untrue statement from an educated American citizen who knew something of the constitutional guarantees, the rights of man and the tradition of fair play in American courts. Certainly it cannot be said that this treatment did not result in a statement from this petitioner which was not voluntary. That the petitioner was an illiterate; that the prisoner was not informed of his rights under local law such as the right to secure a lawyer and "the right to remain silent" "is relevant" to this inquiry.

Harris v. *South Carolina*, 338 U. S. 68, 70.

Later when he was taken to Scotts Bluff County, Nebraska, he undoubtedly remembered his lesson. After twelve days more in confinement before being brought before the magistrate and in the presence of the same officer who brought him from Texas and who had questioned him, and with the same interpreter he undoubtedly again remembered his lesso.. He made the state-

ment which was translated by the sheriff's interpreter as a plea of guilty.

It is significant to note that immediately upon the petitioner being arraigned before the district judge of Scotts Bluff County, Nebraska, and being informed by the court of the seriousness of the charge against him, petitioner immediately desired to have the assistance of counsel and plead not guilty to the charge on file against him

The basic element of due process of law in a criminal prosecution is that a person is presumed innocent until proven guilty. When the evidence to be used against the defendant is a statement of the defendant himself, due process of law requires the State to prove that the statement was made under such circumstances as complied with the technical requirements of due process of law and under such circumstances as a guarantee that the statement was free and voluntary and could not be the result of duress. The illegal detention had some influence upon the making of each of the statements and the plea. The fact that the matters were denied for five days indicates that something occurred during the five days which influenced petitioner. If he had been brought before a magistrate as the law required as soon as possible he would have been brought before a magistrate on the day of his arrest. (He was incarcerated in a jail in the courthouse where courts were presumably in session.) There he would be informed that he was being held on some specific charge (here probably violation of the United States Immigration and Naturalization laws). Here he would learn something of the judicial processes and of his obliga-

tions and rights. Failure to bring this petitioner before a magistrate within a reasonable time does have a causal connection with the change from denial to confession. The burden is upon the State to show the voluntary character of the statements. The record is devoid of any evidence which indicates that the illegal detention did not affect the giving of the statements and the plea.

The requirement that a prisoner must be taken before a magistrate as soon as possible should have more than theoretical significance. A prisoner has some civil remedies which are non-existent in fact where the prisoner is uneducated and in a foreign land, away from friends and not cognizant of his legal rights. He still has a theoretical remedy in suit for damages. Possibility of such suit had no effect on the officers in charge of petitioner.

If there is no compulsion on law enforcement officers to take a prisoner before a magistrate for fear of civil liability, then if this requirement is to have any significance there must be something making it to the advantage of the officers to take the prisoner before a magistrate as soon as possible. A rule of law that confessions obtained during *illegal* detention cannot be used in court will furnish the incentive to the officer. Without such a rule there would be no practical restriction upon an officer holding anyone indefinitely, in excess of twenty-five days, until the desired information was obtained.

An Unlawful Act is Not Due Process of Law.

As a legal proposition this court, so far as the writer knows, has never been presented with a situation where

unlawful detention was isolated from other forms of duress. The court has, however, on numerous occasions considered the facts of an unlawful detention in connection with other forms of duress in a state criminal prosecution where this court's review was limited to the constitutional question of due process of law, such as *Haley* v. *Ohio*, 332 U. S. 596, 92 L. Ed. 226; *Watts* v. *Indiana*, 338 U. S. 49, 93 L. Ed. 1801; *Turner* v. *Pennsylvania*, 338 U. S. 62, 93 L. Ed. 1810; *Harris* v. *South Carolina*, 338 U. S. 68, 93 L. Ed. 1815, and other cases. In reading the opinions of this court which involve state prosecutions and therefore a constitutional question only, the writer has failed to find any consideration given to the question as to whether or not the alleged confessions were, in fact, true or false. The court has not considered even the question of whether or not the confession was in fact voluntary. The court has considered only the circumstances surrounding the taking of the confessions to see whether or not the circumstances "offend the procedural standards of due process". This court has stated that when these circumstances imply "that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right", that the "abuse of the power of arrest" is "so grave" "as to offend the procedural standards of due process" (*Watts* v. *Indiana*, 338 U. S. 49, 54.

> "The Fourteenth Admendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them".
>
> *Haley* v. *Ohio*, 332 U. S. 596, 601.

The constitutional inquiry, therefore, is not with the confession but with the conduct of the investigating

officers at the time of the confession. Their conduct must meet the "procedural standards of due process". Where their conduct is unlawful as here, they have not met that standard. Due process of law cannot embrace an unlawful act.

Confessions Prior to Seasonable Arraignment Are Admissible.

In making this argument counsel does not contend that this reasoning should be extended to holding that all confessions and statements made by a prisoner between his arrest and arraignment are inadmissible. Counsel does not argue that this court should establish a rule which means an absolute prohibition of interrogation while in custody before arraignment. Counsel does not believe that due process of law requires that investigating officers be so restricted. Counsel only submits that due process of law in this connection requires a compliance with law by bringing the prisoner before a magistrate as soon as possible. This gives the prisoner the benefit of the protection of a court. It prevents law enforcement officers from turning "the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court" (*Watts* v. *Indiana*, 338 U. S. 49, 54), or using detention as an investigative aid.

Record Shows No Verification of Confessions.

The writer is cognizant that law enforcement officers rationalize the use of illegal conduct in investigating a criminal matter by the necessity of a solution to the crime and by the fact that illegally obtained evidence and confessions give leads which help the officer to

find admissible evidence. The writer is also cognizant that argument has been made to this court that illegally obtained confessions which are verified by admissible evidence should be admitted in order to properly enforce the criminal law. That sort of argument, if valid, would not be applicable to the present case. The first confession (Exhibit 10, R.103), taken September 23, 1949, by officers in Texas, is very poor in detail. There is nothing in it to lead to verification by extrinsic evidence. The confession of October 1, 1949 (Exhibit 12, R.117) is in sufficient detail to allow such verification. However, there is no significance in any apparent verification of it, because the statement was taken by officers who already knew the only verifiable matters (the body already having been removed and the only verifiable matters are those concerning the body). If this confession is tainted with unlawful conduct of the officers these verifiable matters may well be the result of suggestion on the part of the officers rather than information imparted by the prisoner. If the taint exists as to the confession it likewise exists as to the verifiable material in it under these circumstances. If the confession were free of any taint of unlawful conduct on the part of investigating officers, it would be admissible whether the matters contained therein were verifiable or not.

Illegal Detention After First Confession is Material To Admission of First Confession.

It may be argued that the fact that the petitioner here was held illegally for 25 days is not material to the admissibility of the statement (Exhibit 10, R.103) taken at the end of five days and that only five days' illegal detention should be considered. Argument might

be made concerning the second statement (Exhibit 12, R.117), that twelve days of illegal detention thereafter could not possibly have any influence on the giving of the statement. This court, however, has already considered this argument in a reasonably similar situation and has discarded it in *Haley* v. *Ohio*, 332 U. S. 596, 600, 92 L. Ed. 224. There this court said, referring to the fact that many items of duress involved there occurred after the confession:

> "It is said that these events are not germane to the present problem because they happened after the confession was made. But they show such a callous attitude of the police toward the safeguards which respect for ordinary standards of human relationships compels that we take with a grain of salt their present apologia that the five hour grilling of this boy was conducted in a fair and dispassionate manner. When the police are so unmindful of these basic standards of conduct in their public dealings their secret treatment of a 15 year old boy behind closed doors in the dead of the night become darkly suspicious".

Therefore the illegal detention after obtaining the confessions indicates an attitude of indifference to the rights of this petitioner. This indifference is material to the allegations as to what happened during the five days of the illegal detention and solitary confinement before the first confession (Exhibit 10, R.103) and the illegal detention thirteen days before the second (Exhibit 12, R.117).

Right to Counsel Is Violated By Unlawful Detention.

It is presented herein that the confessions and plea involved herein are inadmissible inasmuch as they were

obtained during a period of 25 days' unlawful detention prior to appointment of counsel to represent the defendant or the petitioner.

The petitioner does not contend that the mere failure of the State of Nebraska to furnish him with counsel during any of this period of 25 days before his arraignment in the county court is a violation of due process of law. Petitioner agrees with the interpretation of this court in the case of *Quicksall* v. *Michigan*, 339 U. S. 660, 661, 94 L. Ed. 1188, 1190, that the

> "State's duty to provide counsel, so far as the United States Constitution imposes it, is but one aspect of the comprehending guaranty of the Due Process Clause".

Petitioner contends that the fact that petitioner did not have counsel during this period of 25 days before his arraignment should be considered only in connection with all the circumstances involved. Petitioner is an illiterate foreigner. Such a person needs the counsel of an attorney earlier than other persons. Failure to bring him before a magistrate as required by law deprives him of the benefit of counsel for a longer time and unduly postpones the time when he receives the legal counsel to which he is entitled by law. Obviously, if he had the opportunity to have had counsel prior to the termination of the 25 days' unlawful detention, competent counsel would have prevented the continued unlawful detention. Failure to have counsel of itself is not argued to be violation of due process. The fact that unlawful detention postpones the enjoyment of the right to advice from counsel is only further indication that unlawful detention is a violation of the due process clause.

Confessions Obtained During Unlawful Detention By Federal Officers Are Inadmissible in State Courts.

This portion of the argument is directed toward that portion of the record that shows that during all the time in which petitioner was in the El Paso County Court House, at El Paso, Texas, that he was held there at request of the United States Immigration and Naturalization Service. The unlawful detention was therefore by federal officers (R.60,68,69). The first statement (Exhibit 10, R.103) was obtained during that unlawful federal detention. Inasmuch as this court has held in *Lustig* v. *United States*, 338 U. S. 74, and other cases that it will not tolerate illegal conduct upon the part of the federal officers, this matter is being called to the court's attention.

The Legal Denial of the Natural Rights of a Single Individual Jeopardizes the Rights Of All.

The affirmance of this case establishes a legal precedent which will be interpreted as justification for conduct as in this case. It will offer a legal excuse to deprive a prisoner of his constitutional "right to a prompt hearing before a magistrate" and "the right to the assistance of counsel", whenever it may suit the convenience of the officer or whenever he may desire to use detention and the implied threat of continued detention, as an aid in the procurement of confessions and satisfactory pleas on arraignment. The officer will be authorized to use this duress and will still be able to testify that no threats or promises were made. This would be a dangerous precedent. It is not only justifi-

cation for the use of detention as an investigative aid but will be construed as authority by callous and indifferent law enforcement officers to further disregard the rights of man. It would give the opportunity to use detention as a device in enforcing indiscriminate regulations established, perhaps, without due process of law. It would offer a legal authority to the use of detention as a political weapon. Historically, those persons who have found that their own particular aims warranted the use of force and deprivation of human rights have found it expedient to have legal authority upon which to base their conduct. In times such as these we should be ever cautious to protect and support the constitutional rules laid down by our forefathers designed for protecting man from the persecution of his government. Public welfare, law and order and the peace and dignity of the United States are much better served by a lawful acquittal than by the loss of those rights for which many of our countrymen have fought and died.

Recently exposed examples of questioned conduct upon the part of some public officials have been designated as an illustration of a lowering standard of official morality. The standard of some officers, partly illustrated by this case, increasingly seems to be "what can I get away with?"—not "what is right?" We live in a moral universe. Our laws are founded upon those "unalienable" rights of man, which can have no other than a universal or divine source. Until this foundation of our law is re-established as a guide to all human behavior, confusion in our public and private conduct will continue. Now is the time to re-affirm those basic principles reflecting the universal law of nature. This

court is the appropriate forum. This case presents a vehicle for such rededication.

CONCLUSION.

For the foregoing reasons, we submit that the Supreme Court of Nebraska should be reversed.

AGAPITA GALLEGOS,
Petitioner,

By JAMES G. MOTHERSEAD,
FLOYD E. WRIGHT,
ROBERT G. SIMMONS, JR.,
His Attorneys.

APPENDIX.

Section 29-406, R. S. 1943, reads as follows:

"Warrant; to whom directed; Content. Warrants shall be directed to the sheriff or to any constable of the county, or if the same is issued by an officer of a municipal corporation authorized to issue such warrants, then to the marshall or other police officer of such corporation, and reciting the substance of the accusation, shall command the officer forthwith to take the accused and bring him before the magistrate or court issuing the warrant or some other magistrate having cognizance of the case, to be dealt with according to law; and no seal shall be necessary to the validity of the warrant."

Section 29-410, R. S. 1943, reads as follows:

"Prisoner; lawful arrest; detention. Any officer or other person having in lawful custody any person accused of an offense for the purpose of bringing him before the proper magistrate or court, may place and detain such prisoner in any county jail of this state for one night or longer, as the occasion may require, so as to answer the purpose of the arrest and custody."

Section 29-412, R. S. 1943, reads as follows:

"Warrant; arrest; prisoner to be taken before a magistrate return; endorsement and delivery. Whenever any person has been arrested under a warrant as provided in Sections 29-410 to 29-411, it shall be the duty of the officer making the arrest to take the person so arrested before the proper magistrate; and the warrant by virtue of which the arrest was made, with the proper return endorsement thereon and signed by the officer, shall be delivered to such magistrate."

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AGAPITA GALLEGOS, PETITIONER,

V.

STATE OF NEBRASKA, RESPONDENT.

—::—

REPLY BRIEF FOR THE PETITIONER.

—::—

JAMES G. MOTHERSEAD,
FLOYD E. WRIGHT,
ROBERT G. SIMMONS, JR.,
Counsel for Petitioner.

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REPLY BRIEF FOR THE PETITIONER.

JAMES G. MOTHERSEAD,
FLOYD E. WRIGHT,
ROBERT G. SIMMONS, JR.,
Counsel for Petitioner.

RESPONDENT ARGUES THAT IF PETITIONER'S CONSTITUTIONAL ARGUMENT IS VALID, THAT IT PUTS UNREASONABLE REQUIREMENTS UPON POLICE OFFICERS. THESE REQUIREMENTS ARE NOT UNREASONABLE WHEN THEY ARE ALREADY REQUIRED BY LOCAL LAW.

Respondent's argument that the failure to bring the petitioner before a magistrate in Texas or Nebraska

earlier than twenty-five days is not an unlawful act, may be fairly summarized as follows:

A. It is unreasonable not to allow officers a reasonable time before preliminary hearing in the State where the crime is committed, to gather evidence and reach witnesses needed at the hearing. Twelve days is not unreasonable where witnesses might be needed from Texas (p.7,12,13, Respondent's brief).

B. It is unreasonable to require officers to take a prisoner before a magistrate in a state other than the one where the crime was committed where he cannot be charged (p.14, respondent's brief). To so require permits the accused to select the forum of preliminary hearing by merely fleeing (p.25, respondent's brief), which is unreasonable.

This reply brief is prepared to demonstrate that the local law of both Nebraska and Texas requires, in both instances, what respondent believes is unreasonable. Compliance with local law should not be an unreasonable constitutional requirement.

A. Respondent, page 7, paragraph E, of his brief, argues that inasmuch as it was necessary to bring witnesses a thousand miles to testify at a preliminary hearing that an additional ten days of normal jail confinement does not seem too long or unreasonable. The respondent argues that to hold otherwise would be to read into the law a requirement that a person charged in one state must be given a hearing before a magistrate at a time and place when inadequate evidence can be presented. Respondent evidently believes this to be an unreasonable requirement.

In making the above argument, respondent overlooked Section 29-501, R. S. 1943, Nebraska, which, in offering protection to a prisoner, might have this result. This section permits the adjournment of the preliminary hearing in order to obtain evidence necessary at a preliminary hearing. The magistrate, however, by Section 29-501 cannot continue the hearing more than four days (see Appendix I). The effect of respondent's argument therefore is that the police or prosecutor should have greater authority in this respect than the law gives the magistrate.

Section 29-502, R. S. 1943 (Appendix II), permits the examining magistrate upon preliminary hearing, after any continuance as provided in Section 29-501, to release the prisoner on bail. The adjournment under those circumstances is limited to twenty (20) days. The respondent's argument that it is reasonable to hold prisoner until the evidence can be obtained before bringing him before the magistrate is in effect argument that it is reasonable for the officer to deprive the prisoner of the opportunity given by law of making bail during that continuance. The law contemplates that the court shall determine the length of the continuance, and the fixing of bond. Respondent argues that it is reasonable for the police to usurp the courts prerogative and make these decisions.

Another fallacy of respondent's argument in this connection is that in this particular case there was no attempt made to present any evidence at the preliminary hearing (R.9) and therefore no need for any such delay.

B. On page 14 respondent argues that it was not necessary to bring petitioner before a magistrate in Texas inasmuch as it could not help to bring him before a magistrate in a place where he could not be charged with a crime. On page 25 of the respondent's brief the respondent argues that the taking of the prisoner before a magistrate in Texas would give the criminal the privilege of selecting the state in which to have his preliminary hearing simply by fleeing. Respondent argues that that is an unreasonable result.

The argument of respondent is fallacious. Requiring what is required by local law is not an unreasonable result. The uniform criminal extradition act (Appendixes III, IV, V, VI), in effect in Nebraska and 34 other states provides that upon the affidavit of a person from another state that a crime has been committed that a warrant may be issued, the person be arrested and be brought before a magistrate and made to answer to the charge. If arrested without a warrant, he "must be taken before a judge or magistrate with all practical speed" and complaint made. This act provides for immediate hearing, proof of probable cause, and for release on bail. The Laws of Texas (Appendixes VII, VIII, and IX), although not the uniform criminal extradition act, require also that a fugitive criminal extradition act, require also that a fugitive arrested in Texas be brought before a magistrate. Upon hearing, the magistrate shall hear proof, and, if satisfied that the accused is the one charged with the offense named in the other state, the prisoner may be released on bail set by the magistrate. Respondent therefore in effect argues that it is reasonable

for the officers to decide whether the hearing shall be had, whether there is probable cause, and whether bail should be allowed. These matters are required to be passed upon by a court, not by irresponsible officers. Petitioner's position is not unreasonable when it results in requiring action already required by local law.

CONCLUSION.

This reply brief is prepared solely to call the court's attention to Sections 29-501, 29-502, 29-713, 29-715, 29-716, 29-720, R. S. 1943 (Nebraska) and Articles 999, 1000, 1001, of the Texas Code of Criminal Procedure, and their effect in reference to respondent's argument.

Respectfully submitted,

AGAPITA GALLEGOS,
Petitioner,

By JAMES G. MOTHERSEAD,
FLOYD E. WRIGHT,
ROBERT G. SIMMONS, JR.,
His Attorneys.

APPENDIX.

I. Section 29-501, R. S. 1943 (Nebraska), reads as follows:

"Examination before magistrate; adjournment; period; prisoner; how sustained and kept. If it shall become necessary for any just cause to adjourn the examination of any person brought before the magistrate as set forth in sections 29-401 to 29-414, it shall be lawful for such magistrate to adjourn such examination and commit such person, from time to time, for safekeeping to the jail of the county until the cause of delay is removed, and no longer; *Provided, the whole time of such confinement in the jail shall not exceed four days;* provided, further, the officer having in custody any such person may, by written order of the magistrate, detain such person in custody in some secure and convenient place other than the jail, to be designated by the magistrate in his order, not exceeding four days; and it shall be the duty of the officer, in whose custody any person shall be detained as above, to provide for the sustenance of such prisoner while in custody."

II. Section 29-502, R. S. 1943 (Nebraska), reads as follows:

"Examination before magistrate; adjournment; recognizance; period of continuance. When it shall become necessary to adjourn any trial according to the provisions of section 29-501, the person accused may enter into a recognizance before the magistrate, with good and sufficient security, to be approved by the magistrate, in such amount as he shall deem reasonable, conditioned for the appearance of such person before such magistrate, at a place and day and hour in the recognizance

specified; Provided, such adjournment shall not be for a longer time than *twenty days* without the consent of the accused; and provided, no person shall be let to bail who is charged with an offense not bailable under the Constitution of this state.

III. Section 29-713, R. S. 1943 (Nebraska), reads as follows: (UNIFORM CRIMINAL EXTRADITION ACT, SECTION 13):

"Whenever any person within this state shall be charged on the oath of any credible person, before any judge or other magistrate in this state with the commission of any crime in any other state and with having fled from justice; or whenever complaint shall have been made before any judge or other magistrate in this state, setting forth on the affidavit of any credible person in another state, that a crime has been committed in such other state, and that the accused has been charged in such state with the commission of the crime, and has fled therefrom and is believed to have been found in this state, the judge or magistrate shall issue a warrant directed to the sheriff of the county in which the oath or complaint is filed, directing him to apprehend the person charged, whenever he may be found in this state, and *bring him before the same or any other judge, court or magistrate who may be convenient of access to* the place where the arrest may *be made to answer the charge or* complaint and affidavit; and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant."

IV. Section 29-714, R. S. 1943 (Nebraska), reads as follows (Section 14, Uniform Criminal Extradition Act.):

"The arrest of a person may be lawfully made also by an officer or a private citizen without a warrant upon reasonable information that the accused stands charged with a crime punishable by death or life imprisonment in the courts of another state; but when so arrested the accused must be taken before a judge or magistrate with all practicable speed, and complaint must be made against him under oath, setting forth the ground for the arrest as in section 29-713; and thereafter his answer shall be heard as if he had been arrested on a warrant."

V. Section 29-715, R. S. 1943 (Nebraska), reads as follows (Section 15, Uniform Criminal Extradition Act):

"If, from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged, and that he probably committed the crime, and, except in cases arising under section 29-706, that he has fled from justice, the judge or magistrate must commit him to jail, by a warrant, reciting the accusation, for such a time, specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the Governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in section 29-716, or until he shall be legally discharged."

VI. Section 29-716, R. S. 1943 (Nebraska), reads as follows (Section 16, Uniform Criminal Extradition Act):

"Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the

state in which it was committed, the judge or magistrate must admit the person arrested to bail by bond or undertaking with sufficient sureties and in such sum as he deems proper, conditioned for the appearance of the prisoner before him at a time specified in such bond or undertaking, and for his surrender to be arrested upon the warrant of the Governor of this state."

VII. Article 999, Code of Criminal Procedure, State of Texas reads as follows:

"When a complaint is made to a magistrate that any person within his jurisdiction is a fugitive from justice from another State or territory, he shall issue a warrant of arrest directing a peace officer to apprehend and bring the accused before him."

VIII. Article 1000, Code of Criminal Procedure, State of Texas, reads as follows:

"The complaint shall be sufficient if it recites:

"1. The name of the person accused.

"2. The State or territory from which he has fled.

"3. The offense committed by the accused.

"4. That he has fled to this State from the State or territory where the offense was committed.

"5. That the act alleged to have been committed by the accused is a violation of the penal law of the State or territory from which he fled."

IX. Article 1001, Code of Criminal Procedure, State of Texas, reads as follows:

"When the accused is brought before the magistrate, he shall hear proof, and if satisfied that

the accused is charged in another state or territory with the offense named in the complaint, he shall require of him bail with sufficient security in such amount as the magistrate deems reasonable, to appear before such magistrate at a specified time. In default of such bail, he may commit the defendant to jail to await a requisition from the Governor of the State or territory from which he fled. A properly certified transcript of an indictment against the accused is sufficient to show that he is charged with the crime alleged. One arrested under the provisions of this title shall not be committed or held to bail for a longer time than ninety days."

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BRIEF OF RESPONDENT.

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CLARENCE S. BECK,
Attorney General State of Nebraska,
WALTER E. NOLTE,
Deputy Attorney General,
HOMER L. KYLE,
Assistant Attorney General,
Counsel for Respondent.

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CLARENCE S. BECK,
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WALTER E. NOLTE,
Deputy Attorney General,
HOMER L. KYLE,
Assistant Attorney General,
Counsel for Respondent.

—::—

OPINION BELOW.

The sole opinion heretofore delivered in the instant case is *Gallegos* v. *State*, 152 Neb. 831, 43 N. W. (2d) 1, issued by the Supreme Court of Nebraska on June 15, 1950. The motion for rehearing in such case was overruled on November 4, 1950. The mandate was issued to the District Court of Scotts Bluff County on November 6, 1950.

JURISDICTION.

Jurisdiction of this court is claimed by reason of the petitioner's contentions that his right to counsel and to be presented before a magistrate guaranteed to him by the United States Constitution (Articles V and VI) were denied him in obtaining confessions of guilt, and that the use of confessions thus obtained upon his murder trial resulted in a conviction of manslaughter without due process of law in violation of the Fourteenth Amendment.

STATEMENT OF THE CASE.

I.

Questions Presented.

The questions for the court would appear to be as follows:

A. Does the failure of state authorities to bring a state prisoner before a magistrate prior to obtaining a confession or admissions from him constitute a denial of due process sufficient to avoid the confessions and to render them inadmissible in evidence?

B. Is a confession voluntarily given by a prisoner inadmissible simply because a period of confinement preceded or followed the giving of such confession?

II.

Statement of Facts.

Respondent accepts generally the statement of facts made by petitioner (Brief of petitioner, pages 3 to 8). It is felt that correction in a few material respects

should be made for such statement is rather argumentatively worded favorable to petitioner's contentions. The record demonstrates the petitioner to be a mature Mexican national who does not speak or read English. The record shows that the questioning of the first two days was solely for the purpose of identifying the accused (R. 81, Q. 1538) and was by one officer in accused's native tongue. The record contains severe doubt that the prisoner was ever placed in the unfurnished, unlighted room, but from petitioner's own description of the room as "next to the office", it is more fairly inferred that he was never placed in such a room (R. 98, Q. 1690). The statement on page 3 of petitioner's brief that petitioner was reincarcerated because he failed to make an incriminating statement is not sustained by the record except as it may be incriminating to divulge a person's true name. Petitioner gave and adhered to the name of Francisco (a girl's name [R. 87, Q. 1597]) Gallegos. Petitioner's statement of facts broadly indicates duress during the first three days of confinement by Texas officers. The record indicates that these procedures (not conceding that any duress is shown) were directed toward establishing his identity (R. 78, Q. 1498, 1499, 1500). The Texas officers spoke to the accused without interpreters (R. 60). The only fear accused entertained during any of his questioning while in Texas was a nervousness at "the first time that the law takes me" (R. 94, Q. 1659). Arrival in Scotts Bluff County, Nebraska, was early in the morning of September 29 instead of on September 28 (R. 106, Q. 1734). No mistreatment is claimed after the taking of Exhibit 10 (R. 108) to the time of trial but a dispassionate statement of facts should include petitioner's comment

in regard to this, to-wit: "I have not been promised, been abused or been given bad threats, I have been treated very nice thanks to God, up to the present time." (Exhibit 12, R. 128.)

ARGUMENT.

Summary of Argument.

1. The evidence in the record clearly demonstrates that the confessions and plea of the petitioner were voluntarily given and that no unconscionable duress was applied in their taking. No civilized standards of investigation were violated by the persons having custody of petitioner.

2. The mere fact that a confession is obtained while a prisoner is in custody does not render such confession invalid or inadmissible in evidence.

3. Under state procedures the time within which a prisoner must be brought before a magistrate depends upon the circumstances of the particular case and the reasonableness of such time is a matter for determination by the state court.

I.

The State of Nebraska appears without shame in the instant case and makes no apology for, in fact feels no apology is required for, its sister State of Texas. To demonstrate the complete reasonableness of petitioner's custody and interrogation we will present at the risk of some repitition a narrative of events. We first observe that petitioner's brief intimates to this court that petitioner is a helpless, ignorant peon caught in a strange land where a tongue which he does not

understand is spoken. We point out that Gallegos is not a feeble old man but a successful thirty-eight year old Mexican laborer who came repeatedly across the Rio Grande to Nebraska to engage in labor and who earned considerable sums of money in this country. Each time he entered he entered illegally and he returned after work periods in this country to his homeland. On his second trip to Nebraska he brought another illegally-entering Mexican, Genovesa Carillo. With her he entered upon the meretricious relationship of common law husband and wife. During what was at least his third illegal period in this country immigration authorities requested a Texas sheriff to apprehend him. The course of his arrest, confession, and detention appear to be particularly natural and normal in view of the distances and other complications involved in the arrest of a so-much-travelled laborer:

A. The arresting officer talked to him briefly and placed him in a small room temporarily. He was recalled the same day for questioning and urged to tell the truth pertaining to his identity. It is inferable (though denied) that a lie detector was mentioned when the accused continued to use an alias.

B. He was not questioned on the second day but was fed and given cigarettes and 50¢. He was questioned on the third day, again as to his identity. He was never questioned at any odd or unusual hours and never for any sustained periods. On the third day he admitted his identity. No charge in the Texas courts was ever made against him except vagrancy. His greatest fear seems to have been that he would be returned to his country

and turned over to authorities there. This fear of being handed over to Mexican authorities is one which must at all times be held by all Mexicans who cross the Rio Grande without proper authority. If it is increased by arrest here in this country that is a situation for which neither the State of Nebraska nor the State of Texas is responsible.

C. On September 23, the fourth day he confessed to a murder in the State of Nebraska which he, for the first time, described. He gave such details as the location of the body in Scotts Bluff County, Nebraska. His confession (Exhibit 10, R. 103) was of such nature as to indicate first degree murder committed out of jealousy of the woman with whom he was living in adultery in the presence of his two children. Authorities in Nebraska were notified, some of the facts were verified and a first degree murder charge was filed in Nebraska on September 23. An officer was dispatched to pick up the prisoner. He travelled by bus.

D. On September 27 the actual custody by Nebraska authorities commenced. Prior to this point the prisoner could not have been charged in Texas with the crime which he revealed. He rode by bus with the Nebraska sheriff to Gering, Nebraska, and arrived far past midnight on September 29. His counsel complains apparently that he was not questioned early the next day. Under the cases of this court it would be more nearly an unconscionable interrogation if he had been aroused early than as in this case allowed to rest throughout the next day. He was given cigarettes

and food in a clean cell. On October 1st while still charged with first degree murder he was questioned again with more particularity. The circumstances of this questioning were entirely regular and should not be an honest subject of complaint unless the prior imprisonment made them involuntary.

His statement here given indicated a murder somewhat lesser in degree since the element of jealousy was not prevalent therein. The petitioner was returned to his cell.

E. Prosecuting attorney must then, under Nebraska law, quoted in the opinion below, arrange for a preliminary hearing. It is obvious that at this preliminary hearing the first confession may be necessary. This will require attendance of an officer residing in El Paso, Texas, and will require arangements for his passage to Nebraska. The nomadic habits of the defendant brought about the situation calling for this repeated travel. Gallegos did not remain in the state and county of his almost perfect crime but slipped away to Texas some 1000 miles away and 30 hours by bus.(1) An additional period of ten days of normal jail confinement in the absence of any request for release or for the right to see an attorney, priest, a friend, or anyone else does not seem too long in view of the physical acts which needed to be accomplished. To hold otherwise would be to read the United States Constitution as requiring that a person charged by one of the states must be

(1) Information furnished by Union Bus Depot, Lincoln, Nebraska.

given a hearing before a magistrate at a time and place when inadequate evidence can be presented, a hearing calculated to release the prisoner in all cases where he has reached a point distant from his crime.

It is true that the laws of Nebraska provide that only the district court (Appendix II) may appoint counsel. This is a matter upon which the legislature of the state should be entitled to speak and it is preferred in Nebraska to have a competent attorney (and certainly such an appointment was made in this case) appointed by a district judge rather than to permit the jailer, the prosecutor, or the sherriff to select a court-hanger-on or incompetent attorney to obtain a politically expedient conviction. Under Nebraska law the prisoner may have made some admissions or even one preliminary plea before counsel at the state's expense is available to him but he does not make such a plea before any court competent to docket a conviction upon his record and he is entitled to have the circumstances or plea passed upon by a jury selected in the neighborhood of a crime and he is entitled to have the jury pass upon the truth of such confession as opposed to the plea of "not guilty" which he then makes or as opposed to the story which he determines to tell in his defense. So in this case the prisoner first appears with counsel on October 15th and repudiates his former plea. The jury under instructions which are not complained of here found the confessions and the plea to have been voluntarily made as is proper under the law. That has been the way the law works in Nebraska ever since criminal procedure was first provided for in her constitution

and laws. It was the law of Nebraka when Agapita Gallegos determined he would prefer working in Nebraska to remaining in his home land. He has been tried and convicted under that course of judicial administration. See

Kitts v. *State*, 151 Neb. 679, 39 N. W. (2d) 283 and cases cited therein.

We urge that there is nothing in the conduct of Texas state authorities as disclosed by petitioner's testimony which indicates any undue duress or improper questioning in the very brief time petitioner was held there. It is well known that many criminal cases are capable of solution only by complete confessions or by admissions which lead to the discovery of physical facts disclosing crime. It is also well known that those who have committed crime are usually not proud of such fact and do not normally notify authorities to that effect. It is further well known that in sorting out the actually guilty from the actually innocent methods of questioning, somewhat less delicate than used in ordinary conversation, may be required. The foregoing narrative argument was indulged in because to reduce this matter to its purest form it was felt necessary to demonstrate that no actual undue periods of time are involved in this cross-country case. Counsel for petitioner repeatedly state "twenty-five days" with respect to the first confession, "twenty-five days" with respect to the second confession and "twentyt-five days" with respect to the arraignment. A true analysis brings up the following schedule:

Item	Date & Time	Elapsed Time	Conditions
Arrest	September 19th	None	No unusual aspects claimed.
First Confession (Exhibit 10)	September 23rd	Four Days	*Questioning for brief periods during three of the days. Different cells, claimed threat of Lie Detector Use, claimed threat of turnover to Mexican Authorities all in search of identity. No fear of bodily injury. Advised that statement would be used against him.
Wait	September 24th - 27th	Four Days	No ill treatment, confinement in "bull pen."
Travel	September 27th 28th and 29th (to 1:00 A. M.)	Three Days	No complaint of treatment during travel with Nebraska Officer.
Second Confession (Exhibit 12)	October 1st	Two Days	Interpreter obtained in Colorado. No previous questioning. Statement taken with full cooperation of accused. Advised of use of statement against accused. Followed by trip to scene of crime. No complaint of treatment in Nebraska.
Preliminary Hearing	October 13th	Twelve Days	Accused incarcerated in Nebraska jail. No complaint of treatment. County judge (by interpreter) causes full explanation of proceedings to accused.

*Even by accused's description the rooms became progressively more comfortable as he continued to deny his identity. It seems obvious that this is not a method of forcing an untrue confession for when he finally confessed to the crime he was in an adequate pleasant cell.

The time of detention was held by the court below to be reasonable and not to have affected its admissibility. This was not a special decision for Gallegos but a reiteration by the court of a long standing rule. See *Maher* v. *State*, 144 Neb. 463, 13 N. W. (2d) 641. It has already been pointed out in this court that any abuses of due process of law habitually or even occasionally carried on by Texas law enforcement officers can be rectified by local vigilance, punished by local law, compensated for by civil suit and escaped from by habeas corpus. See how well fit the words of Mr. Justice Jackson in his concurring opinion in *Watts* v. *Indiana*, 338 U. S. 49, at page 60:

> "* * * Sometimes, as here, more than one crime is involved. The duration of an interrogation may well depend on the temperament, shrewdness and cunning of the accused and the competence of the examiner. But assuming a right to examine at all, the right must include what is made reasonably necessary by the facts of the particular case.
>
> "If the right of interrogation be admitted, then it seems to me that we must leave it to trial judges and juries and state appellate courts to decide individual cases, unless they show some want of proper standards of decision. I find nothing to indicate that any of the courts below in these cases did not have a correct understanding of the Fourteenth Amendment, unless this Court thinks it means absolute prohibition of interrogation while in custody before arraignment.
>
> * * *
>
> "I doubt very much if they require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. It it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected

> of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as 'due process of law'? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society."

Lest the court—as did the dessenting opinion of Mr. Justice Murphy at page 41 of *Wolf* v. *Colorado*, 338 U. S. 25—feel that these remedies are fictitious and inadequate as applied by the states, we remind the court that the United States Congress has enacted, and this court has repeatedly enforced, Federal laws which provide for relief from such oppression or other denial of civil rights under color of state law or authority. See Title 8 U. S. C. A. sections 43 and 47, and Title 28 U. S. C. A. section 1343 for both criminal and civil provisions. See also *Picking* v. *Pennsylvania R. Co.* (3rd Cir.) 151 F. (2d) 240, as to the civil relief afforded and *Screws* v. *United States*, 325 U. S. 93, for a criminal prosecution.

It is our earnest contention that civilized procedures have not been affronted by the treatment of Gallegos. It is obvious that his first confession did not result from twenty-five days of appression. It is also obvious that his second confession was taken in completely voluntary circumstances at the earliest date convenient (when it is recalled that an interpreter needed to be obtained) to the law enforcement officials and courtesy (considering the long bus ride) to the accused. It is equally apparent that ten days of further delay in the setting of a preliminary hearing to which witnesses from more than a thousand miles distance must attend is not improper if unaccompained by ill-treat-

ment or oppression of the prisoner, and the clearly willing cooperation of Gallegos and his description of his treatment show no denial of due process at all.

II.

It is incredible that this court granted certiorari in this case with a view to adopting a rule which will hold invalid any admission or confession made while in custody. To hold that such confession vitiates a prosecution for lack of due process of law will flood the court's of the forty-eight states and of all of the districts of the United States Court system with habeas corpus proceedings from innumerable petitioners who, after apprehension and in-custody questioning, have assisted law enforcement officers in the solution of crime even to the extent of inculpating themselves.

Petitioner's brief (counsel being a county attorney in this state) shows an awareness of this situation on page 18 of his brief where he devotes a paragraph to assuring this court that interrogation, being necessary, should not be forbidden by rule of court. Yet to reverse this case the court must either greatly exaggerate the events which preceded the questioning or adopt just such a rule. Let us examine the normal situation when return of a prisoner is sought under the uniform extradition law. A man commits a crime in McCook, Nebraska. A warning is placed in motion throughout the intricate enforcement agencies circuit. The man is picked up in Pennsylvania, where the sole charge against him is that he is a fugitive from Nebraka. He is held upon this charge with a date set for the hearing upon this charge or is permitted to

arrange bond if he requests this privilege. The governor's requisition from Nebraska is expedited to the point where it takes merely two or three days. The governor's warrant from Harrisburg, Pennsylvania, if expedited, may take another two or three days. The officer in western Nebraska upon being assured that a warrant has issued departs Nebraska for Pittsburgh, is given the prisoner's custody after an additional 48-hour period elapses to permit habeas corpus if desired. We must then assume that since a period of from six to seven days (Gallegos was enroute home four days after Nebraska authorities even heard about the murder) was physically necessary in order to put the prisoner on the road back to the scene of his crime that he may tell the returning sheriff all about his crime on the 1500 mile return trip and then be immune from testimony which confronts him with his admissions. Admissions in just such a case were admitted in *State* v. *Wilshusen*, 149 Neb. 594, 31 N. W. (2d.) 544. We feel it safe to say that the same process is going on all over this land at the present time and that prisoners who are apprehended in places whereat they are unfamiliar with attorneys or bondsmen, they remain seated in their cells until they are picked up by the returning officer. How it would help to bring them before a magistrate in the city where they cannot be charged with their crime is more than we can comprehend and we do not feel that the suggestions contained at page 15, lines 24-32 in the petitioner's brief that a prisoner would thereby immediately become familiar with court proceedings are tenable in any but the most rhetorical sense.

Respondent does not argue this second phase purely to keep writs of habeas corpus from flooding our courts. We urge that the hand of law enforcement should not be handcuffed by imposition of a rule, not deemed necessary in years of jurisprudence on this side of the Atlantic Ocean, which will forever preclude the use of even the most willing confessor's statement. As pointed out numerous times to this court the statute which made the McNabb case rule a fact in the federal jurisprudence was passed for the purpose of deterring unlawful raids upon the public treasury by unscrupulous United States officials and nowhere in its passage was it indicated that due process of law required a hearing near the point of apprehension rather than near the scene of the crime. We are cognizant of the decisions of this court in *Turner* v. *Pennsylvania*, 338 U. S. 62; *Watts* v. *Indiana*, 338 U. S. 49; *Harris* v. *South Carolina*, 338 U. S. 68, and the very complete analysis which the various justices saw fit to make gives us cause to feel presumptuous at exploring the principles therein decided. We earnestly believe that the onerous elements of oppression which impelled this court to be revolted by official conduct in the Watts case, the Turner case and the Harris case will not be found in any fair search of this record. In each of those cases the court found protracted police interrogation. In each case the interrogation was at odd hours and was accompanied by processes which smacked of trial by ordeal. We are at loss to distinguish the vague line marking out the area within which this court feels (or should feel) that a state may be trusted in this phase of Due Process Clause as it respects many of the guaranties of the Federal Constitution and the area within which the states may

not be trusted with respect to the obtaining of self-incriminating information. Text writers prior to and after the decisions of this court which were issued on June 27, 1949, profess equal uncertainty (1) but no one can examine the opinions, and the vigorous dissenting comments, without an awareness that this court within the individual conscience of the human beings which compose it is attempting to maintain in the United States a civilized decency for all who are within its borders. Those standards must be maintained but also must be malleable enough to maintain a system of enforcement of the laws and at the present time this entails a system of punishment for the violators of the law. We find that the succinct observations of members of this court either in opinions or dissents have exhausted the argument and we necessarily borrow therefrom:

Mr. Justice Frankfurter, in *Niemotko* v. *Maryland*, 340 U. S. 268, 95 L. Ed. 263, stated as follows:

> "A state court cannot of course preclude review of due process by merely phrasing its opinion in terms of an ultimate standard which in itself satisfies due process. Watts v. Indiana, 338 U.S. 49, 50 * * * * But this Court should not re-examine determinations of the State courts on 'those matters which are usually termed issues of fact' * * * * And it should not overturn a fair appraisal of facts made by State courts in the light of their knowledge of local conditions."

(1) Orfield, Criminal Procedure (N. Y. U. Press) page 62.
Wigmore Evidence, Vol. 3, Secs. 851 and 852 (1949 Supp.)
American Jurisprudence, Vol. 14 (Criminal Law) Sec. 120-124 (1950 Supp.)

We feel that this court should, except in cases of such flagrancy as will outrage the conscience of the court, leave to the states the procedural requirements for protection of accused persons. In this connection we point out that there has not been alleged or included in this record any indication that there was in the area where Gallegos was tried any hostility toward him, toward Mexican nationals, or in any other respect material hereto. The reasoning adopted by this court in *Adamson* v. *California*, 332 U. S. 46, 68 and *Wolf* v. *Colorado*, 338 U. S. 25, 48 (also decided on June 27, 1949) is most applicable here. The former case involves a California rule permitting comment on the failure of the accused to testify. We use Justice Frankfurter's words with which we agree to press our point here:

> "For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions. * * * But to suggest that such a limitation can be drawn out of 'due process' in its protection of ultimate decency in a civilized society is to suggest that the Due Process Clause fastened fetters of unreason upon the States. * * *"

In that opinion the court adopted the view that the Fourteenth Amendment clearly did not inculcate the Federal Bill of Rights into each state's civil and criminal procedure. The court stated it as follows:

> "* * * (if) every State must thereafter initiate prosecutions through indictment by grand jury, must have a trial by jury of twelve in criminal cases, and must have trial by jury in common law

> suits where the amount in controversy exceeds twenty dollars, is that it is a strange way of saying it."

The Wolf case presented the identical issue upon another federally protected right, freedom from searches and seizures. The Colorado law—similar to that now in effect in Nebraska does not bar use of evidence which has been obtained by ruse or other illegal methods. In the Wolf case a conviction obtained by presenting evidence thus illegally garnered was argued before this court, and the judgment of conviction upheld. The analysis in the opinion of the court prepared by Justice Frankfurter is as complete as could be any law reviewer's handiwork. The inescapable conclusion based upon the history of the state's handling of such procedures was that the provisions of the Fourth Amendment do not operate to exclude evidence in a state trial which may have been obtained by an improper search or discovered by improper means. The analysis of that opinion demonstrates that the habits and rules of the various states not conforming to *Weeks* v. *U. S.* (232 U. S. 383, 58 L. Ed. 652), obtained in such states in many cases prior to the adoption of the Constitutional Amendment itself. The court said:

> "Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal Standards assured by the Due Process Clause a State's reliance upon other methods which if consistently enforced would be equally effective. * * * We can not brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent rem-

edy not by way of disciplinary measures but by overriding the relevant rules of evidence. There are moreovet, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion sporadically aroused be brought to bear upon remote authority pervasively exerted throughout the country."

This court has firmly adhered to a rule which permits the states to ignore the federal right to indictment by grand jury and to provide for prosecution upon information. *Hurtado* v. *California*, 110 U. S. 516, has been attacked numerous times and most recently in *Kennedy* v. *Walker*, 337 U. S. 901, wherein the court conceded its firm position in our law when it affirmed the judgment against a petitioner without even deeming an opinion necessary.

We carefully examined the Harris case (*Harris* v. *South Carolina*, supra) cited by petitioner as having some particular applicability to a person who does not speak English. We recognize that those who enter our boundaries from foreign soils may be a little lacking in constitutional knowledge. We note—extraneous of this record—that vast sums are appropriated annually for the assistance in education of those who properly enter through our ports with approved visas from their home land and their new land. Orientation assistance is given them and their contact with United States courts while preparing for citizenship is encouraged. These vistas were opened to Agapita

Gallegos had he chosen to await his time for proper entry into U. S. A. Instead he brings his adulterous companion into the country via "wet-back" route of sneak entry and then proposes through counsel that his ignorance of our law should entitle him to greater consideration before our state court than would an American citizen of equal comprehension receive. The Harris case is not applicable, and we reiterate, for there is nothing in the record to indicate stupidity on the part of the petitioner. To be sure, the literal translation of the Mexican to English verbiage brings about a rather halting, deliberate and somewhat romantic tenor to his statements (i. e. "She was telling me many things" seems to be synonymous with "She was still nagging at me" [R. 119]), but clearly his behavior was such as to indicate comprehension of his predicament. The early McNabb case turning upon a federal legal question only should not for that reason control this case. The Watts case, the Turner case, the Haley case (*Haley* v. *Ohio*, 332 U. S. 596) and the Harris case all involved examination by this court of a fact question and application of humanitarian principles to it notwithstanding the previous passing on of that question by a jury selected to try the accused. Each case presented a situation of repeated perpetual and unusual interrogation at odd and strenuous hours. In each case the defendant testified contrary to his statement at the trial. Petitioner here merely desires to use these cases and this court's humanitarian examination of official conduct as a bulwark behind which he may avoid punishment for his crime without ever needing to refute the testimony except by a change of his plea from "guilty" to "not guilty".

III.

This case was tried on the theory that a delay having occurred in appearance before a magistrate, nothing thereafter done by the prisoner could possibly have inculpated him. The result is a planned use of this court's sincere desire to protect persons actually oppressed as a complete shroud for the concealment of a hideous crime. It must be recalled that the accused himself by his shuttling about the country in international traffic rendered necessary the type of delays which surrounded his apprehension. It is significant to note that this court with respect to a federal case (*Mitchell v. U. S.*, 322 U. S. 65), relaxed the rule in the McNabb case and affirmed that post-confessional detention does not operate to render inadmissible a confession shortly after custody began, and that since the appearance before a magistrate at an immediately later or at a greatly later time could not possibly affect the voluntary nature of nor the trustworthiness of the confession it should not operate to nullify it. Mr. Justice Frankfurter wrote the opinion—not quite unanimous but as close to unanimity as has any case been since the weight of this perplexing problem fell upon and was accepted by this court, saying:

> "In any event the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These we have seen were not elicited through illegality * * *."

This case answers the contention at page 19 of petitioner's brief, that we urge that necessary detention while awaiting transportation cannot retroactively operate to void the original voluntary confession. The

Haley case in no way tampers with the firmness of the language in the Mitchell case and the Haley case only states that continued *improper* detention is considered only in determining the credibility of the witnesses for the state with respect to the truth about the confession itself. Gallegos does not complain of any treatment after he made his first statement and it is already demonstrated clearly above that it is not unreasonable to wait from September 23 to September 27 for a sheriff to arrive from a point 900 miles away by bus.

We feel that the reasoning of the learned justices of this court in the opinions of *Lisenba* v. *California*, 314 U. S. 219 and *Lyons* v. *Oklahoma*, 323 U. S. 596, still sounds of intelligence. We feel that they are entitled to great weight in consideration of the problem here. Yet our study of the opinions of June 27, 1949, which opinions contain reference to the rule in such cases makes us aware that almost every present member of this court has already given consideration to the existence of those rules. We, therefore, make this our only reference to them and remind the court that both cases carried a long historical story of the repeated attempts to urge this court to change the Hertado doctrine, the Twining doctrine and other landmarks of the humane conflict between federal jurisdiction and state criminal procedure. Professor Inbau's article on what he regarded as a dilemma of this court (The Confession Dilemma in United States Supreme Court, 43 Illinois Law Review 442) has been cited already to this court in briefs we have examined. We do not enlarge this brief by quotations from it but we point out that it contains an ample statement of the elements which are necessary to protect society

from rampant criminology. The broad knowledge of that authority with respect to the problems of discovering crime calls for respect to his sugggestions. We know that this court is aware of the difficulty of drawing an exact line between what will amply preserve our individual rights and what will protect our society itself. The words of the chief justice in the communist cases indicate profoundly the terrific apposition of these two important questions.

In *Dennis et al* v. *United States*, — U. S., 95 L. Ed. — the court said:

> "Chief Judge Learned Hand writing for the majority below interpreted the phrase as follows: 'In each case (courts) must ask whether the gravity of the "evil" discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger'. 183 F. (2d) at 212. We adopt this statement of the rule. As articulated by chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words."

We feel that Agapita Gallegos secured certiorari because of the repeated contentions that he gave up statements and plea *after* twenty-five days of oppression, interrogation, and confinement but that the record now before the court falls far short of establishing anything but a regular and proper inquiry into a murder first disclosed by the prisoner himself. We do not feel that the border-town police of the sovereign State of Texas have conducted themselves in any such way as to shock the conscience of this court.

Nor have the officials of the sheriff's office in Nebraska done so. Nor did the county judge in Nebraska do so.

In this connection we feel it most pertinent to point out that this court refused certiorari in the case of *Alex Agoston* v. *Pennsylvania*, wherein the petitioner sought to present to this court a case which he contended and which two of the justices here believed to be similar to the case of *Turner* v. *Pennsylvania*, 338 U. S. 62. Notwithstanding the scrupulous care used by the court to point out that it did not support the views of the opinion below (*Agoston* v. *Pennsylvania*, 72 Atl. (2d) 575, 75 L. Ed. 35) we earnestly point out to the court that the agressive police methods there applied which involved persistent examination and as the dissenting justices point out "prolonged questioning" were much more vicious and could be said to be much more obviously calculated to bring about a confession which would not be a true one than those required for the apprehending and return to Nebraska of Gallegos in the instant case. That was a case in which an execution was ordered for first degree murder, here a ten-year sentence for manslaughter is considered.

Other Contentions of Petitioner.

VERIFICATION.

Petitioner states in his brief at page 18 that this confession was not verified. We disagree. The confession given in Texas led to an investigation in Scotts Bluff County which disclosed at the place described by the petitioner the body of his former mistress which he said was placed there by him. Much of the testimony was omitted from the record in this court but

we feel the opinion below amply demonstrates verification of the confession.

Federal Detention.

Petitioner claims at page 22 of his brief that the Texas officers were in fact federal officers and that he is entitled to the absolute protection of the McNabb rule citing *Lustig* v. *U. S.*, 338 U. S. 74. We submit this argument is naive and shows no awareness of the true fact. Petitioner was charged as a vagrant. Nebraska claimed him before any federal authority took custody of him and the McNabb rule specifically does not apply. To accomplish what petitioner feels must be accomplished by the states would require reciprocal state enactments giving to magistrates in other states the power to inquire into probable cause for holding prisoners for crimes committed in remote places. Even this would not permit an early hearing for the process of travel must be reversed and the witnesses must be brought from the remote place to the point of arrest. Why we should accord our criminals the privilege of selecting another state within which to have their preliminary hearings simply by fleeing as a fugitive to that state is beyond the comprehension of the respondent and should be, we believe, beyond the thought of this court.

Need for Counsel at All Stages.

It is claimed that Gallegos should have been furnished counsel at every stage of this proceeding. We view this record as one in which at the outset there was no offense known to either Texas or Nebraska officers at any stage of which Gallegos could have been furnished counsel.

No doubt Gallegos could have been given a trial upon the misdemeanor of being a vagrant. There is no showing that he would be entitled to counsel in such a case. His revelations while incarcerated would be admissible against him after such a trial whether given to a fellow prisoner, to the jailer or to the sheriff and the sole test is whether he gave them voluntarily. He even attempted to bargain for the release of his brother by offering to tell the truth. He voluntarily decided to speak and the truth which he told revealed far more than immigration violations which called for an examination into the cold-blooded murder of the missing Mexican person. So it is certain that until he divulged an hitherto unknown death at his hands, of which he had never told anyone, there was no charge upon which the laws of Nebraska authorize furnishing of counsel. At no earlier stage was he entitled to counsel at public expense. It is settled in Nebraska that an accused may not set aside his conviction upon the contention that his preliminary hearing was a trial at which counsel must be assured him. Such a contention was made and decided adversely to the defendant in *Roberts* v. *State*, 145 Neb. 658, 17 N. W. (2d) 777. There the court said:

> "But, this decision need not rest on the procedural point alone. It is clear the preliminary hearing before the magistrate is not a criminal prosecution or trial within the meaning of section 11, art. I of our Constitution. It is in no sense a trial of the person accused. Its purpose is to ascertain whether or not a crime has been committed, and whether or not there is probable cause to believe the accused committed it. Latimer v. State, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403; Van Buren v. State, 65 Neb. 223, 91 N. W.

201; Adams v. State, 138 Neb. 613, 294 N.W. 396; R. S. 1943, Sec. 29-506.

"The rule is that in the absence of a statute a person accused of an offense is not entitled as of right to representation by counsel upon his preliminary examination. 16 C. J. Sec. 579, p. 324; 22 C. J. S., Criminal Law, Sec. 339, p. 498; Blanks v. State, 30 Ala. App. 519, 8 So. (2d) 450. Section 29-1803, R. S. 1943, requiring the court to assign counsel to an accused person in certain cases, who has not the ability to procure counsel, by its terms does not extend to the preliminary hearing."

CONCLUSION.

As throughout this brief we have borrowed from the language of the members of this court, now in our conclusion we borrow from the language of the petitioner as he was examined upon the stand relating to his confession for he more blandly than could we demonstrates the complete lack of any undue duress. He was asked (R.78, Q.1500): "Did he tell you he was going to turn you over to anyone?" and he answered: "That there was nothing said; there was no treatment of that kind. He just wanted to know who I was." He was asked (R. 88, Q. 1603-1604): "Agapito, Mr. Bailey did not ever strike you or beat you, did he?" A. "He has not; he just frightened me and told me he was going to take me in front of the Immigration." Q. "And no one ever struck you or beat you while you were in custody of the officers in El Paso, did they?" A. "No; they just frightened me." And further (R.90, Q. 1619-1623): Q. "What was it which they did which frightened you?" A. "Threatened." Q. "How did they threaten you?" A.

"The first time with a little machine that they were going to put on me. I don't recognize the machine; I don't know the machine." Q. "Do you know the name of the machine?" A. "I don't know." Q. "Were you told what the machine would do?" A. "No; they didn't tell me what that machine would do." Q. "Why did it frighten you?" A. "Because I don't know all of that—or I don't recognize all of that." And further, (R.94, Q. 1658-1660): Q. "Why were you frightened at that time?" * * * A. "Because it is the first time that I enter—the first time that the law takes me." Q. "Do you mean to say that you were nervous at that time?" A. "Uh-huh." Q. "But you were not afraid of being harmed bodily, were you?" A. "No."

There has never anywhere in this record been an attempt to deny the facts contained in the statement. It is not even inferred that the statement is other than truthful. In light of this technical opposition by the accused to the reception of his statement we feel it is most significant to point out that the evidence of any acts calculated to procure a statement other than a true one is very, very flimsy. True, the accused led by his counsel in examination recalled that he was possessed of fear of later punishment at the hands of Mexican police and that he was possessed of some other trepidation. Any of us, apprehended upon the slightest violation of law, would naturally and normally feel such fear of consequences. Perhaps Gallegos was not taken to the Hilton Hotel in El Paso for his examination. But if he were and if the officers had used the enticement of a fine hotel and a bountiful repast as his bonus for telling the truth, the confession would be as susceptible to attack as is the one obtained here. The test must be whether the conduct of the

interrogating officer is one of such nature as would produce an untrue confession of a capital crime. We earnestly submit that there does not appear in the record of this case any departure from orderly police methods of such tenor as would justify this court's adopting a rule which denies the state courts and the state juries of the opportunity to determine these important facts in a crime within the borders of that state.

Just as this court has, in the cases decided on June 20, 1949, served notice upon state authorities that it will not allow a conscientious reluctance to intrude upon state procedures to prevent its intercession in cases where utterly indefensible methods of "3rd Degree", have been indulged; so, in this case it should serve notice upon the underworld that the inclination of this court to intercede in such cases will not constitute an "iron curtain" behind which revelations of unwitnessed crimes may not be obtained at all.

We submit that the judgment of the trial court and of the Nebraska Supreme Court should not be disturbed.

Respectfully submitted,

CLARENCE S. BECK,
Attorney General State of Nebraska,

WALTER E. NOLTE,
Deputy Attorney General,

HOMER L. KYLE,
Assistant Attorney General,
Counsel for Respondent.

APPENDIX.

I.

Article I, Section 11, Constitution of Nebraska reads as follows:

> "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

APPENDIX.

II.

Section 29-1803, Revised Statutes of Nebraska 1943, reads as follows:

> "When any person shall be indicted for an offense which is capital or punishable by imprisonment in the penitentiary, the court is hereby authorized and required to assign to such person counsel not exceeding two, if the prisoner has not the ability to procure counsel, and they shall have full access to the prisoner at all reasonable hours. It shall not be lawful for the county clerk or county board of any county in this state to audit or allow an account, bill or claim hereafter presented by an attorney or counselor at law for services performed under the provisions of this section, until the account, bill or claim shall have been examined and allowed by the court before whom the trial is had, and the amount so allowed for such services certified by the court; *Provided*, no such account, bill or claim shall in any case, except in cases of homicide, exceed one hundred dollars."